90-1068

Supreme Court, U.S.
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CASE NO.

UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,	:	
Plaintiff-Respondent,	:	Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit
- v. -	:	
HAULAWAY INCORPORATED and JOSEPH SCUGOZA, Individually	:	
Defendants-Petitioners.	:	

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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On the Petition:
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QUESTIONS PRESENTED FOR REVIEW

1) Whether the trial court abused its discretion in denying Petitioners' motion for a new trial when it required Plaintiff mid-trial to produce expert testimony and did not give Petitioners adequate time to prepare a defense or the opportunity to present an expert of its own.

2) Whether the trial court abused its discretion in refusing to grant Petitioners a continuance or to allow them to present their own expert testimony after requiring Plaintiff to produce expert testimony three days into the trial when Petitioners did not have sufficient time to prepare a defense due to the enormous investigation that was required in order to respond to Plaintiff's last minute expert.

3) Whether the Court of Appeals compounded the error of the trial court by concluding that a continuance would have been granted if Petitioners requested one, when Petitioners had, in fact, requested a continuance and were, in fact, surprised by the testimony.

    a) Whether the Court of Appeals committed error in denying Petitioners' motion for rehearing on the issue of whether a new trial should have been ordered, when the basis for its decision were matters or facts nowhere supported in the record.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The trial court entered judgment in favor of Plaintiff Secretary of Labor in October 1989 for $437,862.56 in unpaid overtime, plus liquidated damages in an equal amount. (PA-1)[1] The trial court's opinion appears at Dole v. Haulaway, Inc., 723 F. Supp. 274 (D.N.J. 1989). (PA-4) By order dated December 26, 1989, the trial court denied Defendants' motion for a new trial. (PA -39) In an unpublished Memorandum Opinion of the Court (PA - 40), the Court of Appeals for the Third Circuit affirmed. 914 F.2d 242 (3d Cir. 1990). By order entered on October 2, 1990, the Court of Appeals for the Third Circuit denied Defendants' petition for rehearing. (PA -46)

GROUNDS FOR JURISDICTION

(i) Defendants petition this Court for Certiorari seeking review of the Final Judgment entered by the District of New Jersey on November 14, 1989. The court's opinion, dated October 27, 1989, is published at 723 F. Supp. 274 (D.N.J. 1989), aff'd 914 F.2d 242 (3d Cir. 1990).

(ii) Defendants also seek review of Third Circuit Court of Appeals' order denying Defendants' petition for rehearing dated October 2, 1990.

(iii) Petitioners were found to have violated various provisions of the Fair Labor Standards Act, 29 U.S.C. section 201 et. seq. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. section 1254.

[1] "PA" refers to Petitioners' appendix.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

The pertinent statutory provisions involved in this case are 29 U.S.C., sections 216 (b) and (c) which provide:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a) (3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (c a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid

overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection of (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a

period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

STATEMENT OF THE CASE

After a non-jury trial, the trial judge found that Petitioners Haulaway, Inc. and Joseph Scugoza* violated the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. section 201 et. seq. Defendant Haulaway is a solid waste collector servicing residential, commercial and municipal customers and Defendant Scugoza is its president and sole shareholder.

At no time prior to trial did Plaintiff, Secretary of the U.S. Department of Labor name an expert witness. Nor did Plaintiff ever reveal the amount of overtime it claimed was due. Trial commenced on or about July 18, 1989. After the third day of trial, on July 20, 1989 the trial court realized Plaintiff intended neither to present expert testimony, nor to calculate an amount of overtime claimed to be due. Dole v. Haulaway Inc., et. al., 723 F. Supp. 274, 276. (PA-7) Therefore, the court sua sponte ordered Plaintiff to present an expert's report and testimony. In doing so, the trial court admitted that it had erred in allowing the matter to get to trial without having compelled Plaintiff to specify the amount of unpaid overtime or its method of calculating same. Id. at 276-277. (PA-7 to PA-9) The court advised Plaintiff that it was running the risk of having its case dismissed.

* Petitioners Haulaway and Scugoza are hereinafter referred to as "Defendants".

(T420-4 to -6; T428-9; T429-7 to -9). Plaintiff was granted a continuance to July 26, 1989 to prepare its expert report. Id. at 278. (PA-10) However, at the resumption of the trial, Plaintiff called a previously identified fact witness as its "expert" but did not produce a report. Therefore, Defendants were faced with a last minute expert without any oral and/or written report containing an opinion. Plaintiff simply gave Defendants a number it claimed was the unpaid overtime. (T495). Defendants objected on the basis that they could not, under any circumstances, cross-examine the expert without having beforehand some idea of what his testimony would be. (T495-496). The court "assured (Defendants) that once we had gotten the government's case in manageable form we could turn to Defendants' case and the manner in which they would be given a reasonable opportunity to meet the government's evidence and to present their own." Id. at 278. (PA-10)

The expert then testified concerning his calculations as to overtime - essentially the expert took the employees' testimony,* took an average number of hours per employee and multiplied by one and one half (1 1/2) times an hourly rate. Cross-examination was deferred. On July 27, 1989, Defendants began their case and presented testimony. Trial was to resume on July 28, 1989; instead, an in-chambers conference was held with the court and counsel. Defendants' counsel advised the court of Defendants' intention to present an alternative method of calculating the overtime in response to the expert's direct testimony, that is, rather than using the subjective testimony of the employees, Defendants chose to use the records created by the transfer stations or landfills where Defendants took the waste it collected, records from the various municipalities where Defendant Haulaway had refuse pick-up contracts and a time study analysis incorporating the foregoing data. The disposal facilities' records, or "dump" tickets were critical to arriving at an accurate calculation of overall hours worked by the employees. These dump tickets recorded the time of arrival and, in some cases, time of de-

* Much of the employees' testimony was stipulated in lieu of live testimony

parture of every Haulaway truck. (See, e.g. PA-47 and PA-48). The time study analysis was to include actual time and distances from the Haulaway yard, to and through the various municipal and commercial routes, to the disposal site and back to the yard. In this way, the actual hours worked could be obtained, instead of relying on the employees' stories, which varied greatly - indeed, as the trial court noted, to an extent "beyond the expectable." 723 F. Supp. at 285. (PA-24)

Defendants requested that they be permitted to present this analysis through an expert, Barbara Stevens, a nationally recognized expert in time studies in the solid waste industry who had provided such analysis to municipalities and other governmental agencies throughout the United States. The trial judge denied Defendants' request to introduce the testimony of Dr. Stevens*; however, due to the judge's vacation plans and Defendants' request for time to undertake its study, the trial was adjourned to August 21, 1989.

Although Defendants were given a continuance to rebut this new and complicated report and testimony, it was not enough time. 723 F. Supp. at 280-281. (PA-15) As a result, Defendants were caused to suffer extreme prejudice which should have resulted in a new trial being ordered.

Defendants argued on their appeal that the district court failed to mitigate its admitted error by not ordering a new trial after it had required the Government to produce its expert witness three days into trial. In evaluating this argument, the Court of Appeals determined that Haulaway and Scugoza were not prejudiced since they knew the expert witness might be called as a witness, and that the three-week continuance was adequate and more time

* Dr. Stevens is a nationally reknowned expert in the solid waste industry. Stevens was project director of a United States Department of Housing and Urban Development funded project concerning service delivery, including refuse collection, which was built upon findings from a seven year study of refuse collection and disposal, of which Dr. Stevens was co-principal investigator. Dr. Stevens is widely published in the area of solid waste collection services as they relate to time studies, she has delivered papers on the subject at numerous conferences and has provided expert testimony about her research findings.

would have been granted if it had been requested. (PA-43.) These conclusions are factually inaccurate and demonstrate that the Court of Appeals overlooked or misapprehended the record as to these matters. Nevertheless, Defendants' petition for rehearing was denied. (PA- 46.)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT FAILED IN ATTEMPTING TO MITIGATE ITS ADMITTED ERROR IN REQUIRING PLAINTIFF TO PRODUCE EXPERT TESTIMONY AFTER PRESIDING OVER THREE (3) DAYS AT TRIAL, BECAUSE DEFENDANTS WERE NOT PROVIDED SUFFICIENT TIME TO PROPERLY PREPARE ITS CASE DUE TO THE ENORMOUS INVESTIGATION THAT WAS REQUIRED IN ORDER TO RESPOND TO PLAINTIFF'S LAST MINUTE EXPERT.

A new trial should have been ordered due to a serious error committed at trial that caused Defendants severe prejudice. Fed. R. Civ. P. 59. The court ordered Plaintiff to produce expert testimony after hearing three days of testimony. The last minute introduction of expert testimony was quite candidly admitted by the court as error when it rendered its decision:

> This opinion sets forth my findings of fact and conclusions of law. Most of the findings are contained in the critique of the manner in which the court managed the case. It is hoped that the critique may assist other judges avoid the serious mistakes which I made administering the case.
>
> * * *

At no time prior to trial did the government specify the amount of overtime pay it contended was due or its method of calculating that amount.

* * *

I first sensed trouble when, immediately prior to trial, I attempted to find a basis for settlement. The government was unable to state a figure which it claimed would be due if its full claim was allowed. It had no figure derived from the evidence it had assembled which it would advance as total overtime pay due. It had no statement of the methodology it intended to apply to determine the number of overtime hours it claimed each employee worked. That ended settlement discussions.

* * *

I adjourned the trial until Wednesday, July 26 so that the government could prepare the [expert] report and correlate the supporting evidence which I had required. Wednesday arrived and not unreasonably the defendants objected to being confronted for the first time with a complex report and testimony concerning it. I assured them that once we had gotten the government's case in manageable form we could turn to defendants' case and the manner in which they would be given a reasonable opportunity to meet the government's evidence and to present their own.

* * *

The very detailed and rather complicated material presented through Martoccia [Govern-

> ment's expert] was new to defendants. In fairness I had to give them an opportunity to analyze it and to prepare to cross-examine Martoccia. In addition, defendants had an alternative method of calculating overtime which they wished to prepare and offer into evidence through their expert.

723 F. Supp. 274, 276, 278, 280. (PA-6, 7, 10, 15)

Undoubtedly the trial court judge had the best of intentions when it instructed Plaintiff how to present its case. However, the court's instructions required Plaintiff, with no notice to Defendant, to present expert testimony, without which, Plaintiff had no case. Indeed, the trial court admonished Plaintiff that it was facing dismissal of its case. (T429-5 to -11) Obviously then, the introduction of the expert testimony radically altered the case. Due to the fact that Defendants were first confronted with the introduction into evidence of an expert report after three days of trial, the Defendants were clearly caused substantial surprise and prejudice.

Caselaw is clear that unfair surprise warrants a new trial when it deprives a party of a fair hearing. Brady v. Chemical Constr. Corp., 740 F.2d 195, 200 (2d Cir. 1984); Exxon Corporation v. Exxene Corporation, 696 F.2d 544, (7th Cir. 1982); W. A. Wright, Inc. v. K.D.I. Sylvan Pools, Inc. 569 F. Supp. 589 (D.N.J. 1983), aff'd in part, rev'd in part 746 F.2d 215 (3d Cir. 1984); Pakech v. American Export - Isbrandtsen Lines, Inc., 69 F.R.D. 534, 536 (E.D.Pa. 1976). The movant must show reasonably genuine surprise which necessarily was inconsistent with substantial justice and which resulted in actual prejudice. Hickson v. Burkhart, 110 F.R.D. 177 (S.D.W.Va. 1986).

The courts have wide discretion in determining whether production of a last minute witness warrants a new trial. F & S Offshore, Inc. v. K.O. Steel Castings, Inc., 662 F.2d 1104, 1108 (5th Cir. 1981); Shelak v. White Motor Co., 581 F.2d 1155 (5th Cir. 1978), appeal after remand 636 F.2d 1069 (5th Cir. 1981). In making this determination, this court must consider the impact the expert testimony had

on the outcome of the trial, the opportunity and ability the party opposing the expert testimony had to prepare for cross-examination of the expert witness, the ability the party had to prepare its defense in light of the expert testimony and the ability the party had to prepare for and present its own expert. Conway v. Chemical Leaman Tank Lines, Inc., 687 F.2d 108 (5th Cir. 1982), reh denied 693 F. 2d 133 (5th Cir.); Business Ass'n of University City v. Landrieu, 660 F.2d 867, 878 (3d Cir. 1981).

The case of Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926 (3d Cir. 1950), cert. denied. 340 U.S. 906, 71 S.Ct. 281, 95 L.Ed. 655 (1950) is instructive in this regard. In Sutherland, plaintiff sought a declaratory judgment that it did not infringe on defendant's patent. Essential to the case was a judicial determination as to the scope of defendant's patent. The court ruled on this issue adversely to defendant only two weeks prior to trial. Defendant sought a continuance of 90 days to properly prepare for the case in light of the court's rulings. The court denied defendant's motion.

On appeal, this Court found that the trial court abused its discretion in allowing defendant only two weeks to prepare for trial in the face of the court's rulings. 183 F.2d at 931. "The zeal to dispose of pending litigation, commendable in itself, has resulted in deprivation of reasonable opportunity to make adequate preparation for trial." Id. Central to the court's ruling was that the case was a complex patent infringement case which necessarily involved technical and elaborate presentations. Id. The Court stated "(W)e cannot conceive how even the limited discovery granted Defendants could have been of much use in absence of considerably more than two weeks to evaluate and interpret any data obtained and to work it into the framework of the Defendants' presentation." Id. (emphasis added) The court concluded that had Defendant been afforded adequate time to prepare for trial, substantial evidence would have been produced to counter plaintiff's allegations. As a result, the defendant was caused to suffer a hurried preparation of this case which clearly caused prejudice. Id.; See also, Laird v. Air Carrier Engine Service,

263 F.2d 948 (5th Cir. 1959), (where the trial court permitted defense counsel to withdraw, at mid-trial, a stipulation going to the core of Plaintiff's proofs. As a result, the evidence that Plaintiff was required to produce, radically changed. Chaos ensued. The appellate court reversed the decision of the trial court in favor of the defendant, and remanded.)

The case of Pakech v. American Export Isbrandtsen Lines, Inc., 69 F.R.D. 534 (E.D. Pa. 1972) is also instructive. In that case, the defendant introduced testimony at trial regarding a new theory of defense, never articulated at any time before trial. The plaintiff there claimed unfair surprise and moved for a new trial. Unlike Defendants herein who moved for a continuance in the face of the last minute expert witness, the plaintiff in Pakech neither moved for a mistrial nor a continuance. Nevertheless, the court there held that by reason of the previously undisclosed theory of defense presented at trial, Plaintiff was prevented from having a fair trial because of a lack of opportunity to meet the new defense. See also, Foskey v. United States, 490 F. Supp. 1047 (D.R.I. 1979).

Quite often, the best intentions lead to the worst results. In this regard, on the fourth day of trial in this case, the trial judge stated the following:

> Mr. Kay, . . . from what you have hinted during the course of presentation of the testimony, I've got a feeling you'll come to the end of your case and you will have no case, and let me tell you why. Assume I'm a jury, which I am in this case . . . when you are finished I have just heard all this evidence, I have to be able to go back into the jury room and come out with a dollar amount, judgment for the government, $500,000,. $25,000, in overtime pay. How will I be able to do that on the information which you're giving me?"
> (T 420-3 to -14)

* * *

No wonder you couldn't discuss settlement, because you haven't the faintest idea of what each particular employee is owed. I'm convinced by the evidence that they are owed something, but I'm certainly not going to do your work. So go on with the testimony, but you are to give me--and maybe your expert's testimony, he's to get on the stand and he's to testify what in your judgment are the overtime bottom lines here, and he's to tell me how he got there, he, not I.
(T426-10-19)

* * *

I don't know how this ever got to this point . . . I will make sure that every judge in this district knows this problem and never, my advice if followed, would ever let it go to trial before all this is worked out. If this was worked out, you might have been able to settle this case.
(T426-23 to 427-4)

* * *

I'm going to give you the opportunity to prove your case properly, and that means I must have before me the date and the expert's testimony, not like this, but in schedule form. That's what the rule of evidence on schedules is for, so that I can look at it. He can cross-examine so I can have the opportunity to know if there are holes in your schedule, if you have misapplied these records. What you are doing, in effect, is asking me to prepare your case.
(T428-12 to -21)

* * *

> Look, right now you are facing dismissal. You are facing the case being thrown out because I do not have the material on which I can form a judgment.
> (T429-7 to -9)

At no time before trial was it ever suggested that Plaintiff was going to produce expert testimony. Defendants prepared for trial with the clear understanding that Plaintiff was going to proceed to trial without an expert. The entire preparation of this matter was made with this in mind. The court, however, after hearing three days of testimony, realized that Plaintiff needed an expert to prove its case and took it upon itself to direct Plaintiff to produce expert testimony. 723 F. Supp. at 277. (PA-9)

Clearly, the court was aware of the prejudice. Thus, the court "assured (Defendants) that once we had gotten the government's case in manageable form we could turn to Defendants' case and the manner in which they would be given a reasonable opportunity to meet the government's evidence and to present their own." Id. at 278. (PA-10)

However, the court's attempt to mitigate the prejudice to Defendants failed; Defendants were not given a "reasonable opportunity" to prepare their defense. The task was too enormous for Defendants to properly rebut Plaintiff's expert's opinions and to properly prepare for their own expert to testify. (T786-3 to T789-6). During the recess, Defendants requested a further continuance to enable them to complete their preparation. (PA-49.) The court denied the request. On August 21, 1990, when the trial resumed, counsel for Defendants argued that the 3 week recess was inadequate time to prepare the necessary defense.

MR. PRIBISH:

> When I had indicated to your Honor some three weeks ago that I thought we could do this within two weeks time, I did not realize nor appreciate the enormity of the task that I had undertaken. In that regard, your Honor, we had

to go to each of the landfills and transfer stations, and in going to those transfer stations and landfills they were not willing to give up their documents unless they had a subpoena. In addition to that, they were unwilling to do the photocopying, so as a consequence we had to send teams of people in to do this photocopying.

As a result of the efforts of a number of people, your Honor, it took almost 500 hours, excluding my time and Mr. Schneider's time, to prepare the report that we prepared and submitted to the Court and counsel.

Essentially what we did is we took all of the outside data from Edgeboro, from the other landfills, together with the transfer station, identified all of the Haulaway trucks for each sheet generated by that facility, and then took that time together with the actual travel time from the facility back to Hoboken.

What we did is we searched out each of the days and took the last dump time that the trucks made at that facility.

We then input all of that information, your Honor, into a computer. Then if you look at Exhibits B through F, those sheets are essentially computer runs showing the start time -- if you look at Exhibit B -- . . . Exhibit B is the Edgeboro Parsippany Troy-Hills and Butler computer runs for the Edgeboro landfill.

What we did is we took the start time, the landfill time, the travel to Hoboken from the landfill, the standard workday which would be 1315, which would be the standard eight hours, and then what we did is we recorded the time

that the men would have gotten back after leaving the facility as indicated on the landfill time.

What we then did on a daily basis as indicated from the records we had is took each of the days, each of the times, had our computer tell us what the overtime was for each of those occasions. We did this from 1986 for Edgeboro up to November of 1986. We also have in there, your Honor, times for 1987 which go up to -- I believe it's November of 1987. So we took two years of work and input that into the computer.

In addition to that, we took other landfills, and in taking the other landfills and the other transfer stations, we did it on a selective basis because time just didn't permit us to take each month. So what we took were four months of the year, January, April, August and November, which we believed to be the most representative months in terms of volume, in terms of capacity, and we did the same thing for them.

What we did is we computed the overtime for each time that a crew went out on a specific day.

We then took that information, and from that information we were able to calculate how much overtime was spent on an average for each crew, for each day, for each route.

If you look at rider one, your Honor, which is the third page, that shows each of the facilities. It also shows the commercial routes. It shows the total of minutes that were extracted from this information, together with the number of shifts or the number of days that we sampled,

and then we took an average of minutes per shift of overtime, and that would be in the extreme right-hand corner.

We then correlated that with overtime pay, and the overtime pay we used a fixed number of $7 for drivers -- I'm sorry -- $10 for drivers, $7 for helpers for the five-year period. We remained constant.

We didn't deduct it in 1986 where the rates were lower than that.

As a consequence, we broke it down for each area, Parsippany Troy-Hills, Upper Saddle River, Belleville, Butler, commercial, we took the total overtime per year and the total overtime between August 1984 and April 1989.

What we had hoped, in addition to presenting your Honor with this information, was also to present a bar graph generated by the computer which would show the percentage of days in which there was overtime and the percentage of days in which there were days worked less than eight hours. We are working on that information now. I don't know whether we will use it. (T786-3 to 789-6)

It is readily apparent that the Defendants mobilized an intensive effort to prepare its own calculations. First, Defendants engaged Investigative Consultant Services to record the time, mileage and distance of all of Haulaway's commercial and residential solid waste collection routes. (T907-910; T913-24 to T920-3). Employees of Investigative Consultant Services drove the routes to record distances and times from the Haulaway yard, to the different towns, through the routes themselves, and back to the yard at Haulaway. Second, Ms. Adrienne Rogove, Esq., an attorney employed by counsel for Defendants, worked full time contacting landfills to obtain copies of Haulaway's dump

tickets from 1984 to the present time and then organizing the tickets. (T 954-4 to T962-9). The dump tickets record the waste origin and dump times. The purpose of organizing this data was to calculate, based on the dump tickets and time and distance studies, the actual times of each and every route on a daily basis. Thousands upon thousands of tickets were assembled, organized and the information extracted. Also, Mr. Steve Schneider, the expert engaged by Defendants participated with Ms. Rogove in obtaining and organizing the aforementioned information. (T 954-18 to -20)

The scope and extent of the project can be determined by reviewing the testimony of Ms. Rogove. She described to the court the effort taken to collect thousands upon thousands of copies of dump tickets, extract dates and times for a representative four month period of time for the various disposal facilities, record the data extracted and create a computer program to analyze the raw data. (T 953-962)*. This enormous project was solely the result of the court ordering Plaintiff to produce expert testimony in the middle of trial. Despite Defendants' best efforts to complete this monumental project, they literally did not have the resources available to properly prepare an adequate defense on last minute notice.

In addition, Defendants obtained during the course of the continuance an expert report from Dr. Barbara Stevens. Dr. Stevens is a nationally recognized solid waste expert in the field of motion and time management.† Defendants requested to have Ms. Stevens testify and the court refused. (T 1128-10 to -25). If Ms. Stevens had testified, she would have opined that the routes of Haulaway would have generated little, if any, overtime. Moreover, if given the opportunity, it was her desire to actually drive the routes with the employees to calculate, among other items,

* Mr. Dale Baker, Esq., an attorney with defense counsel created the computer program to analyze the data.

† Dr. Stevens had conducted numerous studies for local, county and state governments regarding solid waste collection, costs associated with private solid waste collection and time and motion studies to determine the amount of time it would take to perform collection services.

the number of houses on each route and the amount of garbage generated by each household. With this information, she was prepared to rebut the contention of the employees that the routes took longer than (8) hours to accomplish. This testimony, coupled with documents from the landfills and transfer stations as to the actual times the trucks entered and/or left the facility, would have conclusively demonstrated that overtime was generated only in selected instances and certainly not of the magnitude found by the court. However, Defendants were deprived of this opportunity.

In light of the time constraints placed upon Defendants, they were compelled to act in a hurried manner. This caused a disjointed and inadequate presentation of Defendants' case, and prevented Defendants from presenting their best defense. As a result, Defendants were substantially prejudiced by the introduction of a last minute expert. Under the circumstances, they were unquestionably denied a fair trial.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT DEFENDANTS A CONTINUANCE AFTER REQUIRING PLAINTIFF TO PRODUCE EXPERT TESTIMONY 3 DAYS INTO TRIAL WHEN DEFENDANTS DID NOT HAVE ADEQUATE TIME TO PREPARE ITS DEFENSE IN RESPONSE TO THE LAST-MINUTE EXPERT.

Defendants recognize that "continuance of a trial is a matter of discretion with the trial court." Fontana v. United Bonding Insurance Co., 468 F. 2d 168, 169 (3d Cir. 1972). That discretion was abused in this case. When a party is confronted with a surprise witness or surprise testimony during trial, the court is constrained to take steps to ensure that the party receives a fair trial. In this regard,

the court must consider the actual prejudice to the surprised party, his ability to prepare his case to meet the surprise and whether there was prejudicial reliance on actions by the court. Menendez v. Perishable Distributors, Inc., 763 F.2d 1374, 1379 (11th Cir. 1985); Fenner v. Dependable Trucking Co., Inc., 716 F. 2d 598, 602 (9th Cir. 1983); Fontana v. United Bonding Insurance Co., 468 F.2d 168, 169 (3d Cir. 1972); Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926, 931 (3d Cir. 1950), cert. denied 340 U.S. 906, 71 S. Ct. 281, 95 L.Ed. 655 (1950);

As set forth at length at Point I, supra, the court ordered Plaintiff to submit expert testimony mid-way into trial. To that point in time, Plaintiff had not named an expert. After Plaintiff introduced on July 26, 1989 through its new expert "detailed and rather complicated material" calculating the amount of overtime due, cross-examination was deferred and Defendants began their case on July 27, 1989. On July 28, 1989, the parties appeared and an in-chambers conference was held. Counsel for Defendants advised the court that, in light of the last-minute expert, Defendants planned to undertake a massive effort to rebut the testimony, which would involve timing of several dozen routes, amassing documents from landfills, transfer stations and municipalities, interviewing and preparing affidavits from municipal officials, analyzing all the data and presenting expert testimony on the results of the investigation. The court denied Defendants' request to introduce a new expert; however, in light of the court's vacation schedule as well as the new material presented by Plaintiff, a continuance would be granted until August 21, 1989. Therefore, Defendants' attorneys, investigators, employees and experts undertook the monumental task necessitated by the last minute introduction of Plaintiff's expert. Midway through this effort, counsel for Defendants advised the court that the time allotted Defendants was insufficient and requested an extension of the continuance. (PA-49.) The request was denied and trial resumed on August 21, 1989. However, Defendants were severely prejudiced since they were inadequately prepared to rebut Plaintiff's expert testimony.

The case of Murphy v. Frank Adam, Inc., 107 F.R.D. 744 (D.Me. 1985) is analogous to the within situation. There, following the close of discovery, the Plaintiff named an expert witness. Trial was imminent. The Defendant filed a motion to exclude the expert. In ruling on the motion, the court considered the following:

(1) the prejudice or surprise in fact to the party against whom the excluded witness would have testified;

(2) the ability of that party to cure the prejudice;

(3) the extent as to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and

(4) bad faith or willfulness in failing to comply with the court's order.

107 F.R.D. at 746. In Murphy, the court found that although the Plaintiff was not guilty of bad faith, there was a "serious likelihood of significant prejudice to the defense at trial" if the expert testified, unless certain steps were taken. The court found further that,

> the late production of Dr. Savadov has resulted in the defense being deprived of any opportunity for the taking of expert depositions of Dr. Savadov for discovery purposes and in order to adequately prepare to meet his testimony at trial. Likewise, they are unable, on such short notice, to develop their own expert medical witness, qualified as a psychiatrist of Dr. Savadov's stature to counter the weight which his testimony could well lend to the production of the Plaintiff's medical proof.

Id. In light of the circumstances, the court was "satisfied that these are significant elements of prejudice that must be addressed in some appropriate manner in order to secure the fairness and integrity of the trial process in view of these developments". Id. at 747. However, because the court was adverse to excluding the testimony, it denied the Defendant's motion to exclude the expert upon the condition that Plaintiff produce the expert for deposition, and that if after deposing the expert "defense counsel wish(ed) to have additional time to retain and prepare their own additional psychiatric expert, and so request, the Court will grant a reasonable continuance for that purpose." Id. Finally, mindful of the situation in which the defense was now placed, the court ordered further that should a continuance be requested, counsel should provide with its request, "an estimate of the time required to achieve that purpose so that the Court may have reference to it in determining the appropriate duration of any continuances. Id. at 748.

Unlike the instant case, the court in Murphy was very sensitive to the needs of the defense in preparing its rebuttal to the Plaintiff's late expert witness, including the retention of Defendant's own expert. The principles discussed in Murphy were also raised in Foskey v. United States, 490 F. Supp. 1047 (D.R.I. 1979), although, based on the facts there, a contrary result was reached. There, the defendant complained that the issues as tried did not conform to plaintiff's original claim. The court dismissed this argument, but acknowledged that "the court may freely allow amendment if it serves the presentation of the action and the objecting party would not be prejudiced; a continuance may be granted to enable the objecting party to meet such evidence." 490 F. Supp. at 1059. However, in Foskey, the court found that the defense was "fully prepared to meet each and every issue in this case and in no way can this court find it was prejudiced." Id. Moreover, during an in-chambers conference, the defendant raised the issue of the proofs not conforming to the pleadings, and when the court offered defendants a continuance, the offer was refused. Id.; accord, Szeliga v. General Motors

Corporation, 728 F. 2d 566 (1st Cir. 1984); Exxon Corporation v. Exxeme Corporation, 696 F.2d 544, 548 (7th Cir. 1982).

Similarly, the court of appeals found no abuse of discretion when the district court denied the intervenor's motion for a continuance in Fontana v. United Bonding Insurance Company, 468 F. 2d 168 (3d Cir. 1972). In that case, the plaintiff/obligee on a bond sued United Bonding as surety when the obligor defaulted. A pretrial conference was held in March 1971 and the trial was scheduled for April 12, 1971. Meanwhile, in February of 1971, the Defendant United Bonding was placed in liquidation. One Geeslin, intervener in the case, was appointed as liquidator. On the day of trial, new counsel appeared on behalf of Geeslin and United Bonding. Counsel moved to intervene and requested a six month continuance in order to prepare a proper defense. The court granted the motion to intervene, but denied the motion for a continuance. The reasons for not delaying the trial were that there was no new defense available to Geeslin as intervener that was not available to United Bonding, United Bonding had already engaged in extensive discovery, there was no articulated reason advanced in support of the motion for continuance, and the plaintiffs were elderly. In addition, as soon as the court denied the motion for a continuance, counsel for defendants exited the courtroom, essentially allowing a default to be entered. Therefore, since there was no surprise foisted on defendants, no prejudice and no reliance on some action by the court, there was clearly no abuse of discretion in denying the motion for a continuance. 468 F. 2d at 169; see also, Ferguson v. Bucks County Farms, Inc. 280 F. 2d 739 (3d Cir. 1960).

Defendants herein were irreparably prejudiced by not having adequate time to cure the prejudice foisted on them by the court's actions.

POINT III

THE COURT OF APPEALS COMPOUNDED THE ERROR OF THE TRIAL COURT BY CONCLUDING THAT THE TRIAL COURT WOULD HAVE GRANTED A CONTINUANCE HAD DEFENDANTS REQUESTED ONE, WHEN DEFENDANTS HAD, IN FACT REQUESTED A CONTINUANCE AND WERE, IN FACT, SURPRISED BY THE LAST MINUTE TESTIMONY.

Defendants argued on their appeal that a new trial should have been granted in order to mitigate the district court's admitted error in requiring the Plaintiff Secretary of Labor to produce expert testimony after three days at trial because Defendants were not provided sufficient time to properly prepare their case due to the enormous investigation that was required to respond to the Secretary's last-minute expert report. In its opinion, the Court of Appeals gave three reasons for rejecting Petitioners' argument:

1. The Trial Judge was an experienced jurist who had full knowledge of the case "having supervised it since its inception."

2. The District Court "granted Haulaway a three-week continuance to prepare a defense to the expert report and would have granted additional time if Haulaway had so requested." (emphasis added)

3. Since Haulaway was aware the expert might be called as a witness because he was listed in the pretrial order as a fact witness, Appellants cannot claim surprise when the Court required his testimony.

(PA-43.) Because these "reasons" were factually incorrect and not supported in the record, Defendants petitioned the court of appeals for a rehearing pursuant to F.R.A.P. 40(a). The purpose of the rule is to direct the Court's attention to some material point of law or fact which it has overlooked or misunderstood in reaching its decision, and which, had the matter been considered, would probably have brought about a different result. National Labor Relations Board v. Brown & Root, Inc., 206 F.2d 73, 74 (8th Cir. 1953). Where the Court relies on facts or matters having no support in the record to form the basis of its decision, the granting of a rehearing is warranted. U.S. v. Gorham, 536 F.2d 410, 415 (C.C.A. 1976); Leo Sheep Co. v. United States, 570 F.2d 881, 890-891 (10th Cir. 1977), rev'd on other grounds 440 U.S. 668, 99 S. Ct. 1403, 59 L. Ed. 2d 677 (1979). The above-mentioned reasons stated by the Court of Appeals were entirely without factual basis.

With respect to the assertion that the District Court "had knowledge of the case, having supervised it since its inception," this is factually incorrect. Judge Debevoise, while the judge assigned to the case by the Clerk, had no familiarity with the case prior to trial. All pretrial proceedings were handled by a Magistrate assigned to the file. It was this lack of familiarity and/or attention to the case which led to the District Court's criticism of the parties, counsel and his own offices in his Opinion, 723 F. Supp. 274, 276 (D.N.J. 1989). (PA-6).

The error complained of on appeal was that Defendants were severely prejudiced by the mid-trial calling of an expert witness and presentation of a detailed and complicated report, since they were not given sufficient time to prepare a defense thereto. The procedural irregularities came about as a direct result of the trial judge's admitted lack of familiarity and supervision of the case prior to trial.

The second reason given by the Court of Appeals for affirming the trial court's denial of the motion for a new trial, was that Defendants could have adequately prepared a defense to the expert's report, since the district court "would have granted additional time if Haulaway had so

requested." (PA-43.) This is also factually inaccurate. Defendants did request additional time to prepare its defense by way of letter application to the court dated August 8, 1989. (PA-49.) The court denied that request by way of telephone conference with counsel for the parties after receiving the application. The trial proceeded as scheduled on August 21, 1989.

This application was renewed by counsel when the trial resumed, wherein counsel recounted to the court the monumental effort undertaken by Petitioners, investigators and staff to rebut the expert report and testimony of Plaintiff's expert witness. (See infra. at pp. 10-13) (T785-T792) Despite the pleas of defense counsel, the trial proceeded.

Moreover, Defendants relied on the actions of the court when the court stated:

> I adjourned the trial until Wednesday, July 26 so that the government could prepare the [expert] report and correlate the supporting evidence which I had required. Wednesday arrived and not unreasonably the defendants objected to being confronted for the first time with a complex report and testimony concerning it. I assured them that once we had gotten the government's case in manageable form we could turn to defendants' case and the manner in which they would be given a reasonable opportunity to meet the government's evidence and to present their own.

723 F. Supp. at 278. (emphasis added). (PA-10). After all, it was not bad faith or willful concealment of evidence or a witness on the part of the Plaintiff, but rather the court's direction to Plaintiff to produce expert testimony after trial had already commenced, which placed Defendants in the position of facing surprise. Although the court assured Defendants that it would deal with the situation and allow Defendants a reasonable opportunity to meet the surprise witness, it did not do so. A similar situation arose in Fenner v. Dependable Trucking Co., Inc. 716 F.2d 598 (9th

Cir. 1983), a personal injury action. Before the trial began on July 7th, counsel for defendants advised the court their expert would not be available until July 20th. The trial judge stated "we will work that out." Trial commenced. During Plaintiff's case, he introduced a CAT scan taken during trial showing permanent brain damage. On July 15th, the court announced it would conclude the trial the following day due to his court calendar. Since defendants' expert was not available until the 20th, they were precluded from presenting expert testimony which would have been to the effect that the CAT scan showed no permanent brain damage. The court of appeals held that the Defendants were denied a new trial:

> It is clear to us from this record that the district court's statement to counsel that it would work out the problem faced by the Defendants because their expert would be unavailable until July 20 billed (Defendants) into a false sense of security that the absent witness would be allowed to testify. Because of the court's assurances, (Defendants) did not take steps to secure other expert testimony.
>
> * * *
>
> The court's refusal to allow defense counsel time to present the testimony of their expert to rebut newly discovered damaging evidence presented by the Plaintiff allowed this testimony to go unrebutted. Had the jury heard and believed the testimony of the defense expert, the amount of damages awarded would have been reduced. The court's rulings, precluding the appearance of the defense expert, resulted in the denial of a fair trial.

716 F.2d at 602.

It is abundantly clear that had the trial judge in the case sub judice granted Defendants' request for a continu-

ance, they would have been able to prove that the Secretary of Labor's late submitted expert report was totally erroneous at worst, and alarmingly inflated, at best. In spite of the admission by the trial judge that the material in the report was "very detailed and rather complicated" 723 F. Supp. at 280, (PA-15) it then chose to curtail Defendants' extraordinary, but necessary efforts to prove its inaccuracies. Notwithstanding Defendants' accounting of the 500 plus hours of investigation that they had conducted on the extent of overtime hours, Defendants' examination of and extraction of data from, thousands upon thousands of dump tickets in order to arrive at the specific overtime hours involved, Defendants' counsel, Adrienne Rogove's full time efforts to obtain Haulaway's dump tickets from numerous landfills, Defendants' immediate securing of an expert report from a nationally renowned solid waste expert that directly contradicted the Secretary of Labor's conclusions regarding the amount of alleged overtime hours, these efforts were thwarted when Defendants were not given sufficient time to complete the task.

Moreover, the trial judge refused Defendants' request to have the expert testify. This, despite the expert's preliminary opinion that the routes of the Defendants could have generated little, if any overtime. Simply stated, the Defendants were denied a fair trial. Like the Defendants in the Fenner case, Defendants herein were thrust into a totally untenable position by the court, were assured by the court that it would allow Defendants a reasonable opportunity to confront the surprise testimony of Plaintiff's last-minute, court-ordered witness, and then denied that very opportunity.

The third reason given by the Court of Appeals for rejecting the argument that a new trial should have been granted was that Defendants could not have been surprised by the expert witness, Mr. Raymond Martoccia, because he was identified as a potential witness in the pretrial order. Mr. Martoccia was indeed identified as a fact witness in the pretrial order, and therefore, Haulaway knew that Mr. Martoccia might be a witness. However, this is not the surprise and prejudice to which Defendants

refer. The reference to Mr. Martoccia and his anticipated testimony at trial was as follows:

> Raymond Martoccia, c/o U.S. Department of Labor, Wage and Hour Division, 970 Broad Street , Newark, New Jersey will testify about his investigation activities on this case and conversations during the initial investigation of Defendants and his review of Defendants' records.
>
> * * *
>
> In addition . . . Ray Martoccia will testify about sample computations explaining the method by which overtime compensation found due may be calculated for all affected employees. Mr. Martoccia will also testify about his analysis of Defendants' pay and time records to demonstrate that Defendants did not keep an accurate record of hours worked nor compensate employees at time and one-half said employees' regular rate for overtime hours.

To suggest that Defendants could have known from the foregoing summary of Martoccia's proposed testimony of the detailed calculations of overtime actually testified to by Martoccia, is disingenuous. Neither the expert report, nor the testimony concerning it could have been anticipated at any time until the court ordered mid-trial that such a report and testimony concerning it be presented. Indeed, the district court characterized the report as "very detailed and rather complicated" and candidly admitted the material was "new" to Petitioners. 723 F. Supp. at 280. (PA-15).

Therefore, as the trial court acknowledged, Defendants clearly were surprised, by the mid-trial introduction of expert testimony. This situation is totally unlike the circumstances in Brady v. Chemical Construction Corp., et al. 740 F.2d 195 (2d Cir. 1984) where two insurance companies claimed they were denied a fair trial because of a witness' testimony which unfairly surprised them. They claimed

the witness testified as an expert when he was listed as an ordinary witness in the pretrial order. The court found, however, that the witness did not testify as an expert and that the insurance companies could not have been surprised because they were in possession of the witness' affidavits which revealed the nature of his testimony concerning his investigation and conclusions. 740 F.2d at 201. There is no question in the case sub judice, that Defendants could not have known of Martoccia's testimony conclusions or calculations, which were only prepared mid-trial. The assertion of the Court of Appeals that Haulaway could not claim to be surprised, is without support in the record. On this basis, a new trial should have been granted. Sutherland Paper Co. v. Grant Paper Box Co., 183 F.2d 926 (3d Cir. 1950).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Petition for Certiorari be granted, and the matter remanded to the trial court for a new trial.

Respectfully submitted,

JOHN J. PRIBISH, ESQ.

Dated: December 13, 1990

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor	:	Civil Action : File No. 87-2938
Plaintiff,		: (Judge Debevoise)
v.		:FINAL JUDGMENT
HAULAWAY INCORPORATED and JOSEPH SCUGOZA, Individually,	:	
Defendants.	:	

This action having come on for trial before this court, Honorable Dickinson R. Debevoise presiding, and the claims of liability under the Fair Labor Standards Act having been duly tried and an Opinion, dated October 27, 1989, having been duly rendered it is:

1. ORDERED, ADJUDGED, AND DECREED that defendants, Haulaway Incorporated and Joseph Scugoza, their officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service, or otherwise, be, and they hereby are, permanently enjoined and restrained, from violating the provisions of Sections 7, 11(c), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act of 1938, 29 U.S.C. Sections 201-219 et seq., hereinafter called the Act, in any of the following manners:

(1) Defendants shall not, contrary to Sections 7 and 15(a)(2) of the Act, employ any of their employees who are in any workweek employed in an enterprise engaged in commerce or in the production of goods for commerce,

within the meaning of the Act, for a workweek longer than the applicable statutory maximum hours unless such employee receives compensation for his employment for such excess hours at rates not less than one and one-half times the regular rate at which he or she is employed.

(2) Defendants shall not fail to make, keep, and preserve adequate and accurate records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them, as prescribed by the Regulations issued pursuant to Section 11(c) of the Act and found at 29 CFR Part 516.

(3) Defendants shall not continue to withhold the payment of overtime compensation totalling $437,862.56 found due defendants' current and former employees listed in Exhibit A, hereto, for work performed during the period July 22, 1984 through March 31, 1989. Payment of the back wage amounts listed for each individual in exhibit A, less appropriate legal payroll deductions, shall be made by individual certified checks made payable in the alternative to each of the employees set forth in Exhibit A or "Wage and Hour - Labor" and delivered to plaintiff at Wage and Hour Division, 870 Broad Street, Room 204, Newark, New Jersey 07102 within ten (10) days of entry of this Judgment; and it is further

II. ORDERED, ADJUDGED, AND DECREED that the plaintiff shall recover from defendants an equal, additional amount in liquidated damages totalling $437,862.56 to be distributed to defendants' current and former employees listed in Exhibit A hereto in the amounts listed therein. Payment of said liquidated damages shall be made in full, without any deductions for taxes, by adding the gross amounts listed opposite each employee's name in Exhibit A to the amounts due and owing pursuant to paragraph I.(3) of this Judgment and delivered to plaintiff at the above-mentioned address within ten (10) days of entry of this Judgment; and it is further

III. ORDERED, ADJUDGED AND DECREED that defendants shall make available to plaintiff the social security number and last known address of each employee or

former employee listed in Exhibit A of this Judgment; and it is further

IV. ORDERED, ADJUDGED AND DECREED that if the payments required by paragraphs I.(3) and II, herein, are not tendered within the time specified, post judgment interest pursuant to 28 U.S.C. section 1961 shall accrue on the sums due; and it is further

V. ORDERED, ADJUDGED AND DECREED that any monies due persons under this Judgment and not so distributed by plaintiff within one (1) year, because of plaintiff's inability to locate the proper person or because of such persons' refusal to accept such money, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. section 2041 and 2042; and it is further

VI. ORDERED, ADJUDGED AND DECREED that neither the commencement of this action nor the provisions of this Judgment shall in any way affect, determine, or prejudice any and all legal rights of any employees of defendants, be they current or former employees, to file any action against defendants under section 16(b) of the Act for any violations alleged to have occurred after April 1, 1989; and it is further

VIII. ORDERED, ADJUDGED, AND DECREED that the costs of this action shall be taxed against the defendants.

DATED: November 14, 1989
Newark, New Jersey

"DICKINSON R. DEBEVOISE"

DICKINSON R. DEBEVOISE
United States District Judge

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 87-2938

ELIZABETH DOLE, Secretary ofLabor, United States Department of Labor	:	
Plaintiff,	:	
v.	:	OPINION
HAULAWAY INCORPORATED and JOSEPH SCUGOZA, Individually,	:	
Defendants.	:	

Counsel:

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Solicitor of Labor

Patricia M. Rodenhausen, Esq.
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North Brunswick, NJ 08902
For Defendants.

DEBEVOISE, District Judge.

The Secretary of Labor (sometimes referred to herein as the "government") filed this action on July 22, 1987 alleging that defendants had since at least July 1984 willfully violated and continued to violate the overtime and record keeping provisions of the Fair Labor Standards Act, 29 U.S.C. section 201 et seq. (hereinafter "the Act"). The complaint seeks to enjoin the defendants prospectively from violating these statutory provisions and restrain defendants from withholding any unpaid overtime compensation found due since July 22, 1984 through the entry of judgment or compliance with the Act, and seeks an equivalent amount of liquidated damages.

Defendant, Haulaway Incorporated, (hereinafter "Haulaway") was incorporated in New Jersey in May 1970 and during the relevant period has been engaged in the trash removal business primarily in the State of New Jersey. Defendant, Joseph Scugoza, has, at all times relevant hereto, been the president of Haulaway; held 100% of the stock of Haulaway; and exercised day-to-day control over the business affairs of the corporate defendant. In this opinion when I refer to the "defendant" I shall mean the corporate defendant unless otherwise indicated.

A bench trial commenced on July 18, 1989 and (with a six day interruption) proceeded until July 27 at which time, for reasons which will be described below, it recessed. On August 21 trial resumed and was completed on August 24. This opinion sets forth my findings of fact and conclusions of law. Most of the findings are contained in the critique of the manner in which the court managed the case. It is hoped that the critique may assist other judges avoid the serious mistakes which I made administering this case.

A. Case Management Deficiencies

The most critical issue in this and probably all other FLSA overtime cases is the amount of unpaid overtime hours worked by a defendant's employees. Where, as in this case, the employer has failed to keep adequate records of hours worked, the government of necessity, must devise some reasonable method of ascertaining the overtime hours of affected employees.

At no time prior to trial did the government specify the amount of overtime pay it contended was due or its method of calculating that amount. Rather, it prevailed upon a gullible court to include the following provision in the final pretrial order:

> Many employees will testify to the number of hours worked and the court will make a finding as to their hours. The amount of unpaid overtime compensation due those employees who do not testify will be based on the average number of hours worked found due by the court for the testifying employees. The [Secretary's] compliance officer will testify to application of the statutory formula for overtime compensation and the method for calculating of overtime due, depending on the court's finding of hours worked.
>
> Thus, the record developed at trial will permit the court to find hours worked and plaintiff will then submit an exhibit listing the amount due each employee for incorporation into the Final Judgment.

This sounds most simple. The court merely hears employees' testimony, decides how many excess hours each worked, averages those results for non-testifying employees, and the Secretary will do all the rest.

I first sensed trouble when, immediately prior to trial, I attempted to find a basis for settlement. The government was unable to state a figure which it claimed would be due if its full claim was allowed. It had no figure derived from the evidence it had assembled which it would advance as total overtime pay due. It had no statement of the methodology it intended to apply to determine the number of overtime hours it claimed each employee worked. That ended settlement discussions.

The trial commenced on July 18, 1989 and the government called a number of employees to the stand to present evidence on the basis of which overtime hours were to be computed. I shall list some of the factors which, it developed, affected the determination of overtime hours:

1. During most or all of the 1984-1989 period defendant, a trash remover, served the communities of Upper Saddle River, Belleville, Butler and Parsippany-Troy Hills

and it also had commercial routes identified as Paterson, Hackensack, Hoboken 1 and Hoboken 2. Each route takes a different time to complete; different days of the same route require different times to complete. Most of defendant's employees were assigned to the same route each day, but some worked on different routes in any given week or in different weeks. This was particularly true with respect to employees who worked in Butler, which had collection service only four days each week, and the employees assigned there had to be assigned to other routes on the remaining two days in each week.

2. Most employees, both drivers and helpers, usually worked the full six day week - Saturday through the following Friday, with Sundays off. However, some employees worked less than a six day week and, of course, all employees had absences from time to time.

3. Depending on which route was being served, employees reported at defendant's Hoboken yard at different times in the morning. The reporting times for the various crews was generally testified to as follows: Upper Saddle River - 4:30 - 5:30 a.m.; Belleville - 4:00 - 4:30 a.m.; Butler - 4:30-5:00 a.m.; Parsippany-Troy Hills - 4:45 - 5:00 a.m.; the commercial routes - 5:00 a.m.

4. After collecting all the trash on a given route, it was necessary to take the trash to a landfill, or during later periods to a transfer station. The landfill or transfer stations serving the residential communities were: Upper Saddle River- Bergen County Landfill; Belleville-North Arlington or Kearney Landfill/Newark Transfer Station; Butler-Edgeboro Landfill; Parsippany-Troy Hills-Edgeboro Landfill. Each of the landfills and transfer stations was at a different distance from the communities served and from Hoboken, where the employees returned with the trucks at the end of their work day. There were different waiting times at different landfills and transfer stations; there were different waiting times at the same landfills and transfer stations on different days.

5. On some occasions after all the trash on a route was collected a truck and its crew did not go to the Landfill or transfer station but took the load to the Hoboken yard where it remained overnight.

6. Belleville was served by three trucks with their drivers and helpers for a part of the period in question.

Thereafter the same territory was served by four trucks and their helpers, thus reducing the time required to complete collections.

7. Prior to 1987 each driver and helper had to wash his truck after returning to defendant's Hoboken yard at the end of the day. The job took 15-20 minutes but there were often lengthy waits while other trucks were being washed. In 1987 defendant hired other persons to do the washing, and thereafter the drivers and helpers were able to leave immediately after returning to the yard.

8. Occasionally defendant gave a driver or helper extra pay for an unusually long trip or unusual circumstance.

9. Some helpers did not return to the defendant's Hoboken yard in the evening, but were dropped off nearer their own homes. On occasion some helpers did not go into the Hoboken yard in the morning but were picked up as their truck proceeded to its assigned route.

A number of employees testified about various of the above factors which affected the hours of their work and there was stipulated testimony of an even greater number of employees about these factors. There was some variation in the employees' testimony about the same matters. During the first three days of trial the mass of undigested data referred to above was introduced into evidence by way of testimony and stipulated testimony. By July 20, the third day of trial, it dawned upon me that the government had no intention of using its expertise in this field to pull together the vast array of data and by means of expert testimony or otherwise compute and present what it had concluded was the total overtime for which compensation had not been paid. As government counsel stated "after the Court [makes] a finding on . . . how many hours did people work . . . the government would then go back and present a schedule of the specific dollar amount due for each individual's. (Tr. at 420, 421). The government correctly pointed out that such a procedure was contemplated by the pretrial order. However, awakening at last, I concluded that the procedure was "totally unacceptable" (Tr. at 421) and required the government to be prepared to present through a qualified witness or witnesses a schedule admissible in evidence showing exactly what it was that the government claimed was owing with respect to each employee.

The Court: I'm directing you to have a witness who will give the bottom line and the reasons for the bottom line and a schedule to back it up so that if, theoretically, if I mastered the testimony I could say thank you at the end of the defendants' case and end of your rebuttal case and give you a judgment.

Pretend I'm a jury. You are sending me out to the jury room.

Mr. Kay: I didn't pretend that you are a jury in preparing this case.

The Court: I'm directing you to treat me as if I'm a 12 or six person jury who will have the responsibility, when you finish your closing argument, of retiring to the jury room, deliberating and coming back with a judgment which you will want to enforce, levy on their assets for X amount of dollars.

(Tr. at 436).

That colloquy took place on Thursday, July 20. I adjourned the trial until Wednesday, July 26 so that the government could prepare the report and correlate the supporting evidence which I had required.

Wednesday arrived and not unreasonably the defendants objected to being confronted for the first time with a complex report and testimony concerning it. I assured them that once we had gotten the government's case in manageable form we could turn to defendants' case and the manner in which they would be given a reasonable opportunity to meet the government's evidence and to present their own.

The government called to the stand Raymond A. Martoccia, an able and experienced compliance officer of the United States Department of Labor who for many years had, among other things, computed back wages in situations where, as in the present case, firms did not maintain records of hours worked. After testifying about his investigation of defendants, which began in March 1986, Martoccia, as an expert, gave his opinion about the amount of overtime which was unpaid for the period August 1984

through March 1989 and explained the basis for that opinion. He provided a figure for each of defendant's employees. The total figure (as later corrected) was $583,818.75.

The formula which Martoccia utilized was: The Number of Weeks x Uncompensated Overtime Hours x 1-1/2 x Regular Hourly Rate of Pay Equaled Unpaid Overtime Compensation Due. (Exh. P22).

This formula was applied in the manner described below to each of the 29 workers who testified or as to whom there was stipulated testimony. (Exh. P33, P33A).

With respect to each worker, based on his testimony, Martoccia calculated what his hours were if he worked a full six day week and what his average hours per day were. This was done for the period prior to 1987 when the employees were required to wash their trucks each night and it was done for the period after January 1, 1987 when that task was performed by others. With respect to each worker Martoccia was able to determine what his hourly rate of pay was and how many days he worked from defendant's ADP records.

Attached to this opinion as Appendix A are the two computation sheets prepared in order to compute the overtime pay which the government asserted was owing to Kenneth Lancaster, one of defendant's employees. Similar sheets were prepared with respect to each employee who testified or as to whom testimony was stipulated. I use the Lancaster sheets simply as an example of the government's method, emphasizing that it was one of the simpler computations.

In the upper left hand corner of the first page of the Lancaster computation there appear (i) the number of hours he worked in each week prior to 1987 (67 hours) (when drivers and helpers had to wash their trucks upon returning to Hoboken at the end of the working day); (ii) the number of hours he worked in each day prior to 1987 (11.16 hours); (iii) the number of hours he worked in each week in and after 1987 (60.5 hours); and (iv) the number of hours he worked in each day in and after 1987 (10.08 hours). These figures were based on Lancaster's testimony and on the assumption that he worked a full work week and full work day.

The balance of the first page of the Lancaster computation constitutes a formula for determining the number of

uncompensated overtime hours in weeks when Lancaster worked 6, 5 and 4 days.

Overtime is the number of hours over 40 that somebody works times one and one-half their hourly rate of pay. In the present case the computation is complicated somewhat because each employee who worked a full six day week was paid for 40 hours at the regular ate and for 8 hours at double rate, which would be the equivalent of 16 hours at straight time.

Defendant did have accurate records of the amount which it paid each employee in each week during the post-July 1, 1984 period. This consisted of the ADP Quarterly Employee Earnings Record. (Exh. G1) From those records it was possible to determine the employee's rate of pay and the number of days he worked in each week.

The number of days worked in each week could be ascertained by dividing the hours shown as having been worked in any week by 8, since no matter how many hours were actually worked, these records never recorded more than an 8 hour day or 48 hour week.

In Lancaster's case the ADP records showed that he was paid $46.43 for 8 hours, resulting in an hourly pay rate of $5.8036. In a week in which Lancaster worked six days, he was shown on the ADP records as having worked only 48 hours and was paid accordingly - 40 hours at the regular rate of pay ($5.8036) and 8 hours at double rate for a total of $325. In fact, however, if Lancaster worked a six day week, according to his testimony he actually worked 67 hours prior to 1987 and 60.5 hours after January 1, 1987.

As noted above, if a person worked a full six day week, the sixth day (deemed by defendants' records to be an 8 hour day) was paid at double the regular rate. Sometimes if an employee worked five days, the fifth day would be paid at double time rates, and sometimes if an employee worked four days, one of the days would be paid at double time. All this had to be taken into account when computing overtime due to each employee.

Returning to the first page of the Lancaster overtime computation, that page is essentially a breakdown of different length work weeks, i.e. 6 days, 5 days (with and without overtime paid on the last day) and 4 days (with and without overtime paid on the last day). With respect to the work week of each length, a credit for double time

paid was applied and there was computed the difference between the time which was properly paid and uncompensated time.

For a six day week in Lancaster's case the table showed in its first column the Actual Hours Paid. That consisted of 40 hours of straight time plus 8 hours at double time, which was the equivalent of 56 total hours at straight time (40 + 16). The next column consisted of the Hours Properly Paid, i.e., the number of hours Lancaster could have worked in a six day week without defendant having incurred any obligation for overtime. Since Lancaster was paid double time for 8 hours for the first 48 hours, he could work for more than 48 hours without defendant being in violation of the requirement that it pay one and one-half the regular hourly rate for hours in excess of 40 each week. The Hours Properly Paid column computes the amount of hours Lancaster could work without the defendant becoming liable for overtime. In a six day week that number was 50.66 hours. In a five day week it was 45.33 hours if double time had been paid and 40 hours if such double time had not been paid. In a four day week the properly paid hours were 40 and 32, depending on the payment or non-payment of double time.

The next and last column on the first page of the Lancaster computation set forth Uncompensated Overtime Hours for six day weeks, five day weeks with and without double time and four day weeks with and without double time. The uncompensated overtime was derived simply by subtracting from Lancaster's actual hours worked in each of those categories of weeks and hours properly paid. For example, prior to 1987 Lancaster actually worked 67 hours in each six day week, according to his testimony. The number of hours for which he was properly paid was 50.66. Consequently for each six day week he worked prior to 1987 his uncompensated overtime amounted to 16.34 hours.

Thus on page 1 of the computation sheet there was provided the data which could be applied to Lancaster's actual work record.

Page 2 of the Lancaster computation applies the page 1 data. It shows that during Lancaster's first period of employment (3/14/85 to 9/5/85) he worked 17 six day weeks, 2 five day weeks at double time, 2 five day weeks with no

double time, and a four day week with double time. Similar data is given with respect to the second period during which Lancaster worked for defendant (7/30/87 to 8/27/87). Total overtime owing to Lancaster amounted to $1,095.44.

Similar formulas and overtime computation sheets were prepared for each employee who testified or as to whom testimony was stipulated. Exhibit P33 is the assemblage of these individual computations, and Exhibit P33A contains corrections of certain of the computations. In individual cases other adjustments were entered into the overtime computation to reflect the witness' testimony. For example, Eugene Bryant testified that during the period when three trucks were assigned to Belleville he worked 59 hours per week, and after four trucks were assigned to the town, he worked 53 hours per week. For him, the actual hours worked figure was averaged out at 56 hours, all of which were after January 1, 1987 when drivers and helpers no longer had to wash their trucks at the end of the day.

Having described how he computed the unpaid overtime for defendants' employees who testified or as to whom stipulated testimony was offered, the government's expert Martoccia explained how overtime for non-testifying employees was computed. This is demonstrated in Exhibit P34 (later corrected in P34A) which averages the overtime established for the employees for whom there was testimony or stipulated testimony. There were excluded from the figures entering into the average the hours to which Jasper Smith and Albert Green testified since they were strikingly above the hours of comparable employees. The averages were the pre- and post-January 1, 1987 periods. Certain adjustments were made to account for different conditions pertaining to the individual employees at different times in their employment careers. Using this approach Martoccia arrived at an average of 66-1/4 hours per week for the period after January 1987.

These average figures were then applied to each of defendants' employees who did not testify or as to whom there was no stipulated testimony. Exhibits P35 and P35A contain the computations for all such non-testifying employees. Since the same hours applied to all of them a single sheet could be used containing the formula for determining the number of uncompensated overtime hours in

6,5 and 4 workweeks. A copy of that sheet and of the computations for Al Armour, one of the approximately 170 non-testifying employees is attached as Appendix B. It will be noted that the methodology is the same as that used to compute uncompensated overtime of testifying employees.

I should note that Exhibit P35 was prepared during the trial recess that extended from July 20 to July 26, that its preparation required the services of ten investigators other than Martoccia and the services of the area director and assistant area director of the Northern New Jersey office. This was work which the government originally contemplated doing after the trial was over.

In addition to Exhibits P35 and P35A the government offered into evidence Exhibit P21, which consisted of computations of overtime of six other persons computed prior to trial.

The very detailed and rather complicated material presented through Martoccia was new to defendants. In fairness I had to give them an opportunity to analyze it and to prepare to cross-examine Martoccia. In addition, defendants had an alternative method of calculating overtime which they wished to prepare and offer into evidence through their expert. In order to accomplish this I deferred Martoccia's cross-examination and permitted defendants to commence their case in chief. I then adjourned the trial from July 27 until August 21 when, presumably defendants would be ready to cross-examine Martoccia and to present their own overtime computations. It was anticipated that these computations and an expert's report would be made available to the government well in advance of the adjourned trial date so that it would be prepared to cross-examine the expert and offer any rebuttal evidence it deemed appropriate.

This was obviously a most inefficient way to proceed, but since I had not required the government and defendants to prepare their experts' reports well in advance of trial, fairness and the need to develop the necessary factual data to decide the case seemed to require sacrificing efficiency.

The trial resumed on August 21. Unfortunately defendants had not been able to assemble as quickly as they had hoped the array of records from the landfills and transfer

stations. On the basis of those records defendants expected to establish the actual time when the drivers and helpers were on the job. The government had not been given the two weeks advance notice of defendants' expert's conclusions which I had required, and in fact on August 21 defendants were still working on their expert's presentation. Not unreasonably the government objected to defendants' proffer. When I described below the statistical evidence developed by defendants and the conclusions which their expert drew from it, the merits of the government's position will be better appreciated. Nevertheless I admitted the evidence and the testimony on the condition that after the trial the government be allowed to submit in affidavit form a full critique of the evidence.

So we turn now to defendants' evidence about overtime hours and computations which was introduced during the period August 21-23. During the July 26 - August 21 hiatus in the trial defendants assembled certain data on the basis of which they sought to ascertain overtime hours.

First, defendants obtained records of the transfer stations and landfills to which defendants' trash was hauled. From those records they derived the times when defendants' trucks entered the facility on each day during selected periods of time.

Second, defendants engaged persons to clock the distances to and time required to travel from each transfer station or landfill to defendants' Hoboken plant.

Third, for each route defendants posited a daily starting time, based on testimony.

This data, developed as to varying time periods for defendants' different routes, was fed into a computer which was programmed to produce as to each location a schedule showing for each truck in each day in the selected time period:(i) the date, (ii) employees' starting time, (iii) the time of the truck's last arrival at the transfer station or landfill on that day, (iv) travel time from the transfer station to Hoboken, (v) the time of arrival at Hoboken (derived by adding travel time to landfill time), (vi) the length of the actual workday (the period which elapsed between the starting time and the time of the truck's arrival at Hoboken), (vii) the time when the standard non-overtime workday would have ended, and (viii) the amount of over-

time, if any(the length of time by which the actual workday exceeded the standard workday).

Attached hereto as Appendix C is the first page of exhibit D44 (a) showing a portion of the computer printout applicable to the Parsippany-Troy Hills route (which used the Edgeboro Landfill).

Defendants called as their expert Steven I. Schneider, a professional engineer.

Previously three youths who had been retained by Schneider testified about their following certain of defendants' drivers in May and June of 1989. They had timed the drivers' workdays, observed them and reported on their findings. Schneider himself had followed a number of drivers during May 1989. He had sought to analyze the various routes and determine the time it took drivers on each of those routes to complete their daily tasks.

The testimony of the three youths was not particularly persuasive. Their demeanor on the stand demonstrated that they did not take their work following garbage trucks very seriously and viewed it somewhat as a joke, a humorous interlude in their usually more socially elevated lives.

Schneider was conscientious and serious about his study, but with respect to the period from July 1984 through March 1989 I do not find his observations very useful. Conditions were dramatically different in May and June 1989 from those which prevailed during most of the period to which the government's computations pertain. Further, Schneider's study was very limited and episodic - an inadequate basis on which to make general conclusions.

In addition to timing drivers, Schneider gave his opinions concerning the use of transfer station/landfill records to establish overtime. His opinions in this regard are contained in Exhibit D61.

He had reviewed the computer printouts from the various transfer stations and landfills showing defendant's dumping times. He had reviewed defendant's dump tickets at Edgeboro Landfill and at the Avenue A Transfer Station. He reviewed the computer runs incorporating the same data derived from those documents and the time/distance information with respect to the runs from the transfer stations or landfills to Hoboken.

In Schneider's opinion other than actual observations of the routes from portal to portal, "the times indicated on

the dump tickets and/or landfill/transfer station printouts are the most reliable source of information that can be used to calculate actual hours worked by Haulaway employees." Schneider approved the sample used in the study: "The computer runs contained at [Tabs B,C,D, E and F of Exhibit P61] contain dump times for four (4) random typical months of the year representing each of the four seasons. the months selected were January, April, July and November. It should be noted that November represents a later month for route times since leaf collection is heaviest in that month."

Schneider approved the methodology employed to derive overtime from the computer runs. That method involved first adding all overtime minutes for all trucks sampled at each disposal site, and dividing the sum by the total number of truck shifts sampled. The resulting figure was the average overtime minutes per shift. Appendix D to this opinion is a copy of Rider 1 of Exhibit D44C which sets forth the computation of overtime for each municipality which defendant served.

Having determined the average overtime minutes per shift, the next step was to determine annual overtime pay owing for each location for each year. It was assumed that drivers received $10 per hour and helpers $7 per hour. The following formula was applied to each community: Overtime payable = (hourly rate) X (1.5) x (No. of truck shifts per year) X (average overtime per shift). The total of the figures derived for each community constituted total annual overtime, which amounted to $41,849. Assuming equal overtime in each year, the total overtime which defendants computed for the August 1984 to April 1989 period was $200,875. Appendix E to this opinion is a copy of Rider 2 of Exhibit D44C which sets forth defendants' computation of annual and total overtime.

The government objected strenuously to the admission into evidence of all the material involving the transfer station/landfill dumping times and the calculations based thereon. They noted that they were not alerted to defendants' new method of computing overtime until confronted with it in court. that they had had no chance to review the immense amount of documentation on which it was based, and that they had had no chance to prepare to cross-examine the witnesses who testified on the subject.

Giving added credence to the government's protestations of surprise and prejudice is defendants' own Summation Brief submitted on September 15, three weeks after the conclusion of the trial Apparently defendants themselves were surprised and prejudiced by their own expert's report and exhibits which concluded that the total amount of overtime computed on the basis of the transfer station/landfill data and travel time data was $200,875. The Summation Brief sets forth new assumptions, new corrections and new figures entering into the computations. Defendants submit as exhibits to the Summation Brief new computer printouts in substitution for Exhibits D43 (Edgeboro-Parsippany-Troy Hill), D44a (Morris County Transfer Station - Parsippany- Troy Hills), D45a (Belleville Transfer Station), D46 (Bergen County Utilities Authority - Upper Saddle River) and D47 (Hackensack Meadowlands Baler-Commercial). Defendants also submit as an exhibit to the Summation Brief a new Rider 2 which would replace the Rider 2 which is a part of trial Exhibit D44C.

On the basis of the new material defendants argue that appropriate adjustments to the data which they placed in evidence require a finding that the actual overtime for the 4 years 8 month period is $47,736, not $200,875 as they stated at trial. Defendants also noted a "worst case scenario" which does not take into account days in a week when an employee worked less than eight hours and which assumes that each crew worked at a minimum an 8 hour day. The "worst case scenario" produces total overtime for the entire period of $233,731.79 as shown in defendants' new Rider 2.

The government's objections to the computation evidence which the defendants offered at trial were eminently reasonable and under ordinary circumstances I would not have admitted the defendants' belated proffer. Nevertheless, this was not the ordinary case. The government had failed to prepare its computations until mid-trial and over defense objections I admitted them. To have done otherwise would have resulted in victimized employees not recovering what was due them. In fairness defendant was entitled to the same leniency as was accorded the government. To overcome any unfairness to the government I allowed it to file a post-trial affidavit criticizing the defense

overtime computations. The government took advantage of that opportunity by submitting an affidavit of Raymond A. Martoccia.

However, this leniency does not extend to defendants' post-trial efforts to alter the evidence submitted by them and received at the trial. I shall ignore the exhibits which accompanied defendants' Summation Brief.

It should be apparent that the tortured course of the trial of this case (which had to be tried in three segments during the July 18-August 24 period) was caused by the court's failure to require both the government and the defendants prior to the pretrial conference to submit detailed reports setting forth their computations of overtime hours and the entire basis for those computations. If that had been done the respective experts could have been deposed, the underlying bases for the computations could have been explored and verified, settlement discussions could have been conducted and failing settlement the trial could have been conducted expeditiously without periodic adjournments and without any party facing any surprise or prejudice.

It would appear that the government contemplated putting in the employees' testimony and other evidence going to overtime hours and then asking the court to make a finding of the number of hours worked by each testifying employee. That finding would have constituted the court's judgment. It would have provided the government with the "Actual Hours Worked" figure on its chart entitled "Formula For Determining Number of Uncompensated Overtime Hours in 6, 5, and 4 Day Workweeks." (Appendix A, page 1). I gather that the government intended to send the court a post-trial submission which would have used the hours worked figure found by the court to compute the payments due to the testifying employees for overtime. The post-trial submission would have averaged the hours of the testifying employees, and then used the average hours worked to compute the payments due to the non-testifying employees. In other words after the trial the government would have made the computations which I required be put in evidence at the trial.

If that course had been followed there would either have had to have been a second trial on the various steps of the computations or a judgment would have been en-

tered without giving the defendants their constitutional right to a trial on actual factual issues.

The actual hours worked by each employee was not the only issue to be tried. The reasonableness of each step of the government's computation raised factual questions.

For example, the concept of averaging the hours of the testifying employees to find an hours figure for each non-testifying employees raises a number of factual issues. Early in this opinion I noted some of the many variables which affect the hours which employees worked. Each of those variables presents factual questions. Further, assuming that each testifying employee accurately stated the total hours he worked each week, one could still question whether the sample of employees whose hours entered into the average was representative of all the employees, whether each of the critical variables was accounted for in the sample, etc. I have no doubt a statistician would have a field day analyzing simply the averaging aspect of the government's methodology. Unless the government is required to prove the validity of its computations in toto at a trial, a defendant would not have an opportunity to challenge them and thus would be deprived of due process. The computations are not mechanical matters which the trial court can refer to the government or even a special master. The pretrial order which the court entered contemplated such a course and that is why in mid-trial I corrected the errors of my ways.

B. Overtime Computation

Both the government's and defendants' methods of computing overtime hours are imperfect devices necessitated by defendants' inexcusable failure to keep adequate records. Neither method produces a perfect result, but I conclude that of the two the government's is the more likely starting point. Substantially for the reasons set forth in Martoccia's rebuttal testimony and in his post-trial affidavit (which will be received in evidence as Exhibit P45) I conclude that defendants' approach is fatally flawed. These reasons can be summarized as follows:

1. Defendants' calculations took no account of the considerable time employees spent waiting to wash their trucks and washing their trucks prior to 1987.

2. The calculations used an erroneous 5:15 a.m. starting time. The starting time of employees working in Belleville was 4:30. The starting time of employees working in some of the other communities was earlier than 5:15 a.m.

3. The computer runs for Belleville and Parsippany-Troy Hills erroneously included respectively 180 and 160 lines where no transfer station or landfill times were noted, resulting in a smaller average overtime figure.

4. There were numerous instances where a trip to the dump should not have been included because the same truck was counted again later in the same day. By counting the same truck twice in a single day, the reports inflated the entry columns labeled "# shifts sampled per exhibit" on Rider 1 of D-61. Since the "# shifts sampled per exhibit" was divided into the total overtime minutes, a lower divisor would increase the average overtime minutes per shift.

5. The defendants' report does not reflect the time of trucks which continued to work after the time they were at the transfer station and returned to the Hoboken yard with partial loads which would be unloaded the next day.

6. Defendants' calculations are based on data from limited periods of time which are not representative of the entire August 1984-March 1989 period. The periods for which the date was taken were generally in more recent months, while, as I shall note below, the more serious overtime violations occurred in the earlier years.

7. The report does not take into account that in earlier years there were only three trucks in Belleville and only three pickup trucks in Saddle River.

8. There were days when defendant provided services, yet no trucks were listed in defendants' computations.

9. Defendants' calculations failed to take into account the waiting time at the transfer stations and landfills after the trucks were weighed in. That time could be considerable.

10. The formula used in Rider 2 of Exhibit D44C is flawed and results in an understatement of overtime. The reasons for this are explained in paragraphs 15-18 of Martoccia's affidavit.

For these reasons I conclude that overtime cannot be derived using defendants' methodology. There are

distortions in the government's approach, but I conclude it is basically sound and it was appropriate to use it under the circumstances. I will adopt that approach but discount the overtime figure derived from it in an attempt to adjust for the distortions.

I reject two of defendants' grounds for objecting to the government's methodology - (i) the asserted failure to give defendants credit for breaks which the employees of work time to perform personal tasks.

The testimony of the employees called by the government was consistently to the effect that employees stopped to purchase food or soft drinks when the occasion presented itself and ate on the run, often taking their food and drinks to the trucks and eating while on the road. Some of defendants' witnesses described longer stops and regular practices of having breakfast at certain locations or receiving sandwiches from customers or gathering for a while and eating and resting.

"To qualify as a bona fide noncompensable break, the respite must be uninterrupted and at least 30 minutes in duration, and the employee must be completely relieved from duty. See 29 C.F.R. subsection 785.19." Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113 (4th Cir. 1985). Since 1940 the Administrator of the Wage and Hour Division of the U. S. Department of Labor, whose duty is to administer and interpret the Act, has stated that short breaks are compensable:

> Rest periods of a short duration, running from 5 to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked.

Defendants had no announced policy with respect to breaks. Notice was not given to employees that during the working day they were entitled to free time of any specified duration in order to eat or rest. The haphazard breaks taken to grab a sandwich, coffee or a soft drink did not qualify as an interruption of the workday sufficient to constitute noncompensable time.

Defendants presented evidence that on occasion after a route had been completed a truck and it's crew would

proceed to perform a private job for a resident. Defendants also presented evidence that on occasion an employee did not return directly to Hoboken after completing his route and instead stopped off at a motel or tavern. It is quite likely that events such as these which defendants' witnesses described took place from time to time, but the evidence is anecdotal. The evidence does not support a finding that these events took place with sufficient frequency to affect the government's calculations of overtime hours. If the events had occurred with such frequency, surely defendants would have learned of them and stopped them.

However, in one respect defendants' critique of the government's calculations has some (though limited) merit.

The government's calculations depend upon the accuracy of the employees' testimony about the number of hours they worked. One would expect that there would be differences in such testimony considering that a long period of time was involved, some employees worked the same route as others but at times when conditions were different, and human memories are fallible. Although certain variations in testimony are to be expected, I conclude that the variations in testimony in the present case went beyond the expectable. There were exaggerations of starting times and ending times which had the effect of unduly increasing the hours of the working day, skewing in an upward manner the hours testified to and the hours found by averaging the hours testified to.

Upward skewing also arises from the fact that it appears that the uncompensated overtime diminished towards the end of the computation period. In fact the testimony of defendants' managers, and the testimony of those who observed the operation of the routes in May and June 1989, suggests that by then defendant had brought themselves into substantial compliance with overtime requirements.

This is not a surprising result since trial of this case was approaching and defendants could have expected closer scrutiny. Further, efficiencies had been introduced into the operations; the new transfer stations permitted more rapid dumping of loaded trucks; and recycling regulations in some municipalities reduced the loads

which had to be picked up. Thus to apply the same average overtime hours for the entire period from January 1, 1987 (when drivers and helpers no longer had to wash their trucks) to March 31, 1989 most likely inflated the total overtime figures.

There are probably a number of ways in which these two inflating tendencies could be dealt with, such as adjusting the hours which went into the average hours and recomputing the amount owed each of the 185 employees.

Given the imprecision which necessarily accompanies any method, I conclude that a reasonable and practical means of adjusting for the two skewing tendencies which I noted is to discount the government's total overtime figure by a reasonable percentage and reallocate the resulting amount in an appropriate manner among the employees. Defendants cannot complain about imperfections in the government's methodology nor about my imprecise means of adjusting the government's figures. These steps are necessitated by defendants' failure to keep proper records over a very long period of time and are permissible. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

The government's corrected total overtime figure is set forth in Martoccia's post-trial affidavit. (Exhibit P45). It amounts to $583,816.74. It will be adjusted to account for the two inflating factors I noted in two ways: (i) the $583,816.74 figure will be reduced by 25% to $437,862.56 and (ii) Defendants will be deemed to have complied with all overtime requirements for the period April 1, 1989 to the date of judgment. This will not bar any employee or employees in a new action from asserting a claim that he or they were not paid proper overtime pay during that period and seeking to prove that claim by means of evidence applicable to that limited period.

The awards payable to non-testifying employees as shown in Exhibit P45 will each be reduced by 25%. In the case of testifying employees, at the government's discretion, either the individual awards may each be reduced in a manner devised by the government which will equitably distribute the total amount payable among the individual members of that group (such as applying a uniform average hours figure to all these employees so as not to penalize the employees who testified to more conservative and perhaps more accurate figures).

C. Conclusions of Law

Section 17 of the Fair Labor Standards Act, 29 U.S.C. Section 217 and 28 U.S.C. Sections 1331 and 1345 confer subject matter jurisdiction on the court.

Defendant Haulaway is an employer which has employees who are employed in an enterprise engaged in commerce or in the production of goods for commerce. 29 U.S.C. Section 203(s). The evidence established that Haulaway's employees used trucks, truck parts, containers, fuel and other materials that moved in commerce. Employees of commercial trash collectors are within the coverage of the Act, e.g., Brennan v. Metropolitan Trash, Inc., 513 F.2d 1324 (10th Cir.), cert. denied, 422 U.S. 1042 (1975).

The Act's overtime provisions prohibit any "employer" from failing to pay overtime compensation. The Supreme Court has characterized the Act's statutory definition of an "employer", 29 U.S.C. Section 203(d), as the "broadest ... that has ever been included in any one act", United States v. Rosenwasser, 323 U.S. 360, 363 n. 3(1945). A corporate officer with operational control is an "employer", along with the corporation, jointly and severally liable under the Act for unpaid wages. Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983). Further, any such corporate officer is liable in his individual, not representative, capacity. Donovan v. Grim Hotel Company, 747 F.2d 966, 971 (5th Cir. 1984). Brock v. Superior Care, Inc., 105 CCH Lab. Cases Paragraph 34, 839 (E.D.N.Y. 1986) (holding two corporate officers individually liable as employers), aff'd on other issues, 840 F.2d 1054 (2d Cir. 1988).

The evidence established that Mr. Scugoza was the president and sole shareholder of the corporate defendant. In addition to holding corporate authority, Mr. Scugoza actually exercised day to day control over the affairs of the corporate defendant including approving promotions and raises, hiring and discharging employees, and establishing other terms and conditions of employment.

Section 7(a)(1) of the Act requires employers to pay employees that work in excess of forty hours per week overtime compensation equivalent to one and one-half times the employees' regular hourly rate. 29 U.S.C. Section 207 (a)(1). I have set forth above my findings that defendants' employees were not paid for overtime as

required by the Act and that the amount of the nonpayment was $437,862.56.

Section 11(c) of the Act, 29 U.S.C. Section 211(c), requires that an employer "shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him...." 29 U.S.C. Section 211(c). Section 15(a)(5) of the Act, 29 U.S.C. Section 215(a)(5), makes it unlawful to violate Section 11(c). The Secretary's implementing regulations are found at 29 C.F.R. Part 516 and require, inter alia, that employers preserve, for three years, records of the (1) total daily and weekly hours employees work; (2) employees' regular hourly rates of pay for each week that overtime is worked; (3) total daily or weekly straight time earnings' and (4) total weekly premium pay for overtime hours. 29 C.F.R. Sections 516.2 and 516.5.

Defendants were in flagrant violation of these record keeping provisions, and even though shortly before trial defendants installed a time clock for punching in and out, it is not clear that they have yet met the statutory requirements.

Under Section 6(1) of the Portal-to-Portal Act, 29 U.S.C. Section 255(a), the statute of limitations bars wage claims accruing more than two years prior to the filing of the complaint, unless the violation is found to be willful, in which case recovery of back wages can be held that a violation of the Act is willful if "... the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677 (1988). In its decision the court found that willfulness was synonymous with the terms "voluntary", "deliberate", and "intentional". Id. at 1681.

Here the evidence establishes willful violation of the Act. Louis Garibaldi, the defendants' general manager from 1984 to January 1987, was aware of the time and one-half requirement. Eddie Rodriguez, payroll supervisor since 1983, was aware of the requirement. Scugoza authorized extra pay on certain occasions, showing a recognition of overtime obligations. Employees complained to defendants' supervisory personnel about working overtime without proper pay and were told, in

effect, that if they didn't like it they could leave. Defendants sought to conceal the fact that they were not paying required overtime pay by failing to keep proper records and by demanding that employees sign untruthful statements about the correctness of their pay as a condition to receiving their paychecks.

In light of the foregoing findings the three year, rather than the two year statute of limitations is applicable, and defendants are each liable for overtime pay for the period August 1, 1984 through March 31, 1989 (the cutoff date of the government's computations).

Section 16(c) of the Act, 29 U.S.C. Section 216(c), authorizes the Secretary of Labor to present a claim to recover liquidated damages in an amount equivalent to the unpaid overtime compensation found due. The purpose of liquidated damages is to compensate employees by making them whole for the delay in receiving wages improperly denied them through violations of the Act. Overnight Motor Co. v. Missel, 316 U.S. 572, 582-84 (1942). Brock v. Superior Care, Inc., 840 F.2d 1054, 1064 (2d Cir. 1988). Its purpose is not punitive. Marshall v. Brunner, 668 F.2d 748 (3d Cir. 1982). Under the principles enunciated by the Third Circuit in Brunner and more recently in William v. Tri-County Growers, Inc., 747 F.2d 121 (3d Cir. 1984). if the employer proves to the satisfaction of the court that (1) the acts or omissions giving rise to minimum wage or overtime violations were in good faith, and, (2) that the employer had reasonable grounds for believing that the acts or omissions were not in violation of the Act, the court may, in its discretion, decide not to award any liquidated damages, or to reduce the amount of liquidated damages. This is an affirmative defense afforded the employer by 29 U.S. C. Section 260. See also Brock v. Wilamowsky, 833 F.2d 11, 19 (2d Cir. 1988).

Defendants have failed utterly to establish either the good faith or reasonable grounds basis for escaping liquidated damages. The facts which establish the willfulness of their conduct affirmatively negate their good faith and reasonable grounds contentions. Further evidence of bad faith and unreasonableness is defendants' evasive, dilatory and obstructive conduct after Martoccia commenced his investigation.

The investigation began in March 1986. Great difficulty was encountered in meeting with defendants or their attorneys. Records were requested and not provided. When records were sent they were incomplete or not responsive to requests. Representatives of the government met with defendants' attorneys in December 1986 and pointed out that defendants were not keeping records and that it appeared on the basis of a preliminary examination that employees were working on the average 67-1/2 hour six day weeks. The defendants were informed how they could get into compliance. This advice was not followed.

Quite clearly defendants are liable for liquidated damages for this entire period.

Section 17 of the Act, 29 U.S.C. Section 217, provides for equitable relief in the form of injunctions to restrain future violations of the Act and to restrain the continued withholding of back wages due. The decision to grant injunctive relief under Section 17 lies within the sound discretion of the district court. Mitchell v. Lubin, McGaughy & Associates, 358 U.S. 207, 215 (1959).

The defendants have been guilty of egregious violations of the record keeping requirement of the Act and of the overtime payment requirements. It has not been established that their record keeping now complies with the Act. I have concluded that in recent months defendant have been making the overtime payments required by the Act in that it appears that the work week has been shortened so as not to require overtime. There is no assurance, however, that this eve-of-trial reform will continue.

Under all the circumstance described above injunctive relief is appropriate and necessary to ensure future compliance with the Act.

D. Conclusion

Both defendants have violated the record keeping and overtime payment requirements of the Fair Labor Standards Act. Their conduct was willful, and consequently the three year statute of limitations is applicable.

The total amount of overtime payments for which defendants are liable is $437,862.56. Defendants are obligated to pay liquidated damages on that full amount.

The government is entitled to injunctive relief to ensure future compliance with both record keeping and overtime payment provisions of the Act.

The government is requested to submit a form of order implementing the foregoing.

DATED: October 27, 1989

"DICKINSON R. DEBEVOISE"
DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX A

FORMULA FOR DETERMINING NUMBER OF UNCOMPENSATED OVERTIME HOURS IN 6, 5 AND 4 DAY WORKWEEKS

Actual Hours Worked	Actual Hours Paid	Hours Properly Paid			Uncompensated Overtime Hours
6 7/wk per 87 11.16/day		**6 DAYS**			
60½ Pass 8 78 10.08/day	40 hrs. at straight time + 8 hrs. at double time (or 16 hrs. at straight time)	40 hrs. + $\frac{16 \text{ hrs.}}{1.5}$ = 40 hrs. + 10.66 hrs. = 50.66 hrs.		67 / 60½ - 50.66 hrs.	= 16.34 / 9.84
		5 DAYS INCLUDING 8 HRS. AT DOUBLE TIME			
C	32 hrs. at straight time + 8 hrs. at double time (or 16 hrs. at straight time)	40 hrs. + $\frac{8 \text{ hrs.}}{1.5}$ = 40 hrs. + 5.33 hrs. = 45.33 hrs.		55.8 / 50.4 - 45.33 hrs.	= 10.47 / 5.07
		5 DAYS WITHOUT ANY DOUBLE TIME			
	40 hrs. at straight time	40 hrs.		55.8 / 50.4 - 40 hrs.	= 15.8 / 10.4
		4 DAYS INCLUDING 8 HRS. AT DOUBLE TIME			
C	24 hrs. at straight time + 8 hrs. at double time (or 16 hrs. at straight time)	40 hrs.		44.64 / 40.32 - 40 hrs.	= 4.64 / .32
		4 DAYS WITHOUT ANY DOUBLE TIME			
	32 hrs. at straight time	32 hrs.		44.64 / 40.32 - 32 hrs.	= 8 hr + 4.64 / 8 hr + .32

EXPLORE: ANCESTRAL RIGHTS

APPENDIX A - continued

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

WAGE TRANSCRIPTION AND COMPUTATION SHEET

Establishment _____ Date _____

Employee LANCASTER KENNETH Social Security No 14962 9475

Address _____

Occupation Pile 87 67 part 60 1/2

Week Ending	Hours Worked	Total	Rate of Pay	Amount Due Employee
3/14/87	6 days		5.8036	
	17 hrs x 16.34 hrs x 1 1/2 x 5.8036 =			416.67
	5 day DT			
	2 x 10.47 hrs x 1 1/2 x 5.8036 =			182.29
	5 days			
	2 x 15.8 hrs x 1 1/2 x 5.8036 =			275.09
	4 days			
	1 x 8 hrs x 5.8036 + 1 x 4.6 hrs x 1 1/2 x 5.8036 =			86.81
	46.42		40.39	
9/5/87				
	87			
2/20/87	6 days			
	1 x 9.84 x 1 1/2 x 7.9359 =			117.13
	4 days			
	2 x 8 x 7.9359 + 2 x .32 x 1 1/2 x 7.9359 =			134.58
	126.97		7.61	
5/27/87				
				1095.44

Form WH-56 (Rev. 6/80)

Compliance Officer _____ A-

APPENDIX A-2

APPENDIX B

FORMULA FOR DETERMINING NUMBER OF UNCOMPENSATED OVERTIME HOURS IN 6, 5 AND 4 DAY WORKWEEKS

Actual Hours Worked	Actual Hours Paid	Hours Properly Paid		Uncompensated Overtime Hours
66 1/4 / wk Pre 87 11.04 / day		**6 DAYS**		
	40 hrs. at straight time	40 hrs. + 16 hrs. / 1.5	Pre 87 66.25 – 50.66 hrs.	= 15.59
60 / wk Post 87 10 / day	+ 8 hrs. at double time (or 16 hrs. at straight time)	40 hrs. + 10.66 hrs. = 50.66 hrs.	Post 87 60	9.34
		5 DAYS INCLUDING 8 HRS. AT DOUBLE TIME		
	32 hrs. at straight time	40 hrs. + 8 hrs. / 1.5	Pre 87 55.2 – 45.33 hrs.	= 9.87
	+ 8 hrs. at double time (or 16 hrs. at straight time)	40 hrs. + 5.33 hrs. = 45.33 hrs.	Post 50	4.67
		5 DAYS WITHOUT ANY DOUBLE TIME		
	40 hrs. at straight time	40 hrs.	Pre 87 55.2 – 40 hrs. Post 50	= 15.2 10
		4 DAYS INCLUDING 8 HRS. AT DOUBLE TIME		
	24 hrs. at straight time	40 hrs.	Pre 87 44.16 – 40 hrs.	= 4.16
	+ 8 hrs. at double time (or 16 hrs. at straight time)		Post 0	
		4 DAYS WITHOUT ANY DOUBLE TIME		
	32 hrs. at straight time	32 hrs.	Pre 87 44.16 – 32 hrs. Post 0	Pre 87 = 44.16 hrs

APPENDIX B - continued

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

WAGE TRANSCRIPTION AND COMPUTATION SHEET

Establishment: _____ Date _____

Employer Armour AL Social Security No 254-58-4512

Address _____ (Zip Code)

Occupation _____

Week Ended	Hours Worked	Rate or Pay	Amount Due Employee
4/3/84			
	16 day week -		
	2 x 15.59 hrs x 1½ x 5.8038 =		27.144
	5 Days - D.T.		
	2 x 19.87 hrs x 1½ x 5.8038 =		17.165
	5 Days wk - No D.T.		
	4 x 15.2 x 1½ x 5.8038 =		529.30
	4 Day wk - No D.T.		
	5 days x 5.8038		46.43
	1 x 41.16 x 1½ x 5.8038 =		36.21
4/10/84			
	See Attached Sheet		

Compliance Officer SS

A—

APPENDIX B-2

APPENDIX B - continued

U.S. Dept. of Labor
Employment Standards Administration
Wage and Hour Division

WAGE TRANSCRIPTION AND COMPUTATION SHEET

Establishment _____ Date _____

Employer Arnaud, AL Social Security No _____

Address _____ (Zip Code)

Occupation _____

Week Ended	Hours Worked	Rate of Pay	Amount Due Employee
7/30/66	- 5 Day wks with OT		
	2 wks + 9.87 Hours + 1½ x 5.8038		171 85
	4 Day wk + Some OT		
	1 x 4.16 x 1½ x 5.8038		36 22
	4 Day wk + No OT -		
	2 x 8 x 5.8038 +		92 8-
	2 x 4.16 x 1½ x 5.8038 +		72 43
8/6/66	- Hours 5.9625		
8/13/66	5 Day wk No OT -		
	1 x 13.2 x 1½ x 5.9625		118 41
	5 Day wk with OT		
	2 x 9.87 x 1½ x 5.9625		177 12
	4 Day wk with OT		
	1 x 4.16 x 1½ x 5.9625		37 33
9/25/66	4 Day wk - no OT -		
	2 x 8 x 5.9625		95 72
			94 00

Compliance Officer 2 x 4.16 x 1½ x 5.9625-

Grand Total $ 1404 14

APPENDIX B-3

APPENDIX C

MORRIS COUNTY TRANSFER STATIO', INC. - Parsippany

CHART NO 8

	A	B	C	D	E	F	G	H
1								
2		START	LANDFILL	TRAVEL TO	ARRIVE AT	WORK	STANDARD	OVER
3	DATE	TIME	TIME	HOBOKEN	HOBOKEN	DAY	DAY	TIME
4								
5	4/1/88	5:15	9:59	0:45	10:44	5:29	13:15	########
6	4/1/88	5:15	10:20	0:45	11:05	5:50	13:15	########
7	4/4/88	5:15	7:09	0:45	7:54	2:39	13:15	########
8	4/4/88	5:15	7:13	0:45	7:58	2:43	13:15	########
9	4/4/88	5:15	12:19	0:45	13:04	7:49	13:15	########
10	4/4/88	5:15	13:10	0:45	13:55	8:40	13:15	0:40:00
11	4/4/88	5:15	13:25	0:45	14:10	8:55	13:15	0:55:00
12	4/5/88	5:15	9:56	0:45	10:41	5:26	13:15	########
13	4/5/88	5:15	13:54	0:45	14:39	9:24	13:15	1:24:00
14	4/5/88	5:15	14:40	0:45	15:25	10:10	13:15	2:10:00
15	4/6/88	5:15	10:00	0:45	10:45	5:30	13:15	########
16	4/6/88	5:15	10:26	0:45	11:11	5:56	13:15	########
17	4/6/88	5:15	13:54	0:45	14:39	9:24	13:15	1:24:00
18	4/6/88	5:15	14:00	0:45	14:45	9:30	13:15	1:30:00
19	4/7/88	5:15	9:01	0:45	9:46	4:31	13:15	########
20	4/7/88	5:15	10:46	0:45	11:31	6:16	13:15	########
21	4/7/88	5:15	11:29	0:45	12:14	6:59	13:15	########
22	4/7/88	5:15	11:46	0:45	12:33	7:18	13:15	########
23	4/8/88	5:15	10:04	0:45	10:49	5:34	13:15	########
24	4/8/88	5:15	10:29	0:45	11:14	5:59	13:15	########
25	4/11/88	5:15	8:19	0:45	9:04	3:49	13:15	########
26	4/11/88	5:15	9:10	0:45	9:56	4:40	13:15	########
27	4/11/88	5:15	13:37	0:45	14:22	9:07	13:15	1:07:00
28	4/11/88	5:15	14:25	0:45	15:10	9:55	13:15	1:55:00
29	4/11/88	5:15	14:55	0:45	15:40	10:25	13:15	2:25:00
30	4/12/88	5:15	7:38	0:45	8:23	3:08	13:15	########
31	4/12/88	5:15	12:24	0:45	13:09	7:54	13:15	########
32	4/12/88	5:15	12:40	0:45	13:25	8:10	13:15	0:10:00
33	4/13/88	5:15	9:18	0:45	10:03	4:48	13:15	########
34	4/13/88	5:15	9:29	0:45	10:14	4:59	13:15	########
35	4/13/88	5:15	13:09	0:45	13:54	8:39	13:15	0:39:00

APPENDIX D

Rider 1

Facility	Community	Total OT Min. Per Exhibit	# Shifts Sampled Per Exhib	Average OT Minutes Per Shift
Morris County Transfer Sta.	Parsippany Troy Hills	4,537	346	13.11
Bergen County Landfill	Upper Saddle River	2,372	118	20.10
Belleville Transfer Sta.	Belleville	37,683	840	44.86
Edgeboro Landfill	Butler	34,460	768	44.869
Hackensack Meadowlands Baler/ Landfill	Commercial Hackensack & Hoboken	8,281	406	20.40

APPENDIX E

Rider 2

Overtime payable = (hourly rate) x (1.5) x (# of truck shifts/year) (driver/truck shift) x (average overtime minutes per shift/60 min. per hour).

Assuming drivers earn $10 per hour and helpers earn $7 per hour, the annual overtime payable is as follows.

Parsippany/Troy Hills:

OP = (10 + $7) x 1.5 x (728) x (1) x (13.11/60) = $4056.00

Upper Saddle River:

OP = ($10 + $7) x 1.5 x (624) x (1) x (20.10/60 = 5330.00

Belleville:

OP = ($10 + $7) x 1.5 x (1248) x (1) x (44.86/60) = 23794.00

Butler:

OP = ($10 + $7) x 1.5 x (312) x (1) x (45/60) = 5964.00

Commercial:

OP = ($10 + $7) x 1.5 x (312) x (1) x (20.4/60) = 2705.00

Total Annual Overtime = 41849.0

Total Overtime between Aug. 1984 and April 1989 =$200875.00

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY

ELIZABETH DOLE, Secretary of Labor, United States Department of Labor,	:	Civil Action
	:	File No. 87-2938
Plaintiff,	:	(J. DEBEVOISE)
v.	:	
HAULAWAY INCORPORATED and JOSEPH SCUGOZA, Individually,	:	ORDER
Defendants.	:	

Defendants having filed post trial motions 1) for a new trial, to set aside the verdict, and to file a supplemental brief out of time and 2) to settle the form of judgment, plaintiff having responded thereto, and the court having considered same, it is hereby for the reasons stated on the record

ORDERED this 26th day of December, 1989 that all of defendants post-trial motions are denied in all respects with prejudice against their being refiled.

"DICKINSON R. DEBEVOISE"
HONORABLE DICKINSON R. DEBEVOISE
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5056

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor

Appellee

vs.

HAULAWAY INC.; JOSEPH SCUGOZA, Individually

Appellants

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 87-02938)
District Judge: Honorable Dickinson R. Debevoise

Submitted Under Third Circuit Rule 12(6)
August 16, 1990
Before: MANSMANN, GREENBERG and SEITZ, Circuit Judges

(Filed August 22, 1990)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal we are faced with the question of whether the district court abused its discretion by permitting the Secretary of Labor to introduce the testimonial evidence of an expert witness in the midst of a trial which the defendant employer claims was prejudicial surprise. Because

the district court gave the defendant a three week continuance, during which time the defendant could prepare for cross-examination of the expert witness, and since the government had listed the witness in its pretrial report as a possible witness, thereby putting the defendant on notice, we do not find that the district court abused its discretion nor that the defendant was prejudiced. Consequently, we will affirm the judgment of the district court.

I.

On July 22, 1987, the Secretary of Labor filed suit against Haulaway, Incorporated and Joseph Scugoza (collectively referred to as Haulaway) alleging violations of the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq. The Secretary charged that Haulaway had failed to keep accurate records and pay overtime to its employees, and sought back pay and injunctive relief.

Haulaway is a refuse hauler with its principal place of business in Hoboken, New Jersey, although it provides service for four communities: Upper Saddle River, Belleville, Butler, and Parsippany-Troy Hills. In addition, Haulaway had four commercial routes in other communities. A simplified summary of the facts is explained below; a more in-depth description of the complicated factual situation can be found in the district court's excellent opinion at Dole v. Haulaway, Inc. 723 F. Supp 274 (D. N.J. 1989).

During the period 1984-1989, Haulaway employed approximately 24-30 drivers and helpers. On a normal work day, the employees generally started at 4:30 a.m. or near 5:00 a.m., and ended any where from 2:00 to 5:00 p.m., depending on the route. On Saturdays, the work day would be shorter by a few hours. After collecting the trash on a specific route, the drivers then had to haul the trash to the landfill or transfer station. Again, depending on the route, the drivers and, if applicable, helpers would return to the yard and wash the truck at the end of the day. Sometimes the employees would have to wait their turns to wash the trucks. After 1987, Haulaway hired other employees to do the washing and the drivers and helpers were able to leave the yard after returning from their respective routes.[1]

[1] The district court found that some helpers did not return to the yard at night but were dropped near their homes, while some were picked up on the way to the collection route rather than report to the yard in the morning.

The case proceeded to bench trial where the Secretary offered proof alleged that the employees were entitled to back pay for the overtime which had not been paid during the five year period. The problem, which surfaced as the government presented its evidence at trial, was that the Secretary had not calculated the specific amount of overtime due to each employee. Instead, the Secretary had persuaded the district court to provide in the pretrial order that the government would call many employees to testify as to their average number of hours worked. Those employees not testifying would have their overtime calculated by the application of the average hours found to be due to the testifying employees.

After the third day of trial, the district court realized that the government had not prepared any methodology or system of presenting its evidence, i.e., it had no bottom line figure for the amount due to the employees. Thereafter, the court ordered the government to prepare a report with supporting evidence to provide the required information. The court gave the government six days to prepare the report. After the evidence was presented by the government's expert witness, the compliance officer who had investigated the violations, the court gave Haulaway three weeks to prepare a defense to the government's expert's report. Protesting that the continuance was insufficient, the defense nonetheless presented the expert testimony of a professional engineer with its calculation of the amount owed to the employees as back pay.

The district court credited the report of the government's witness over the defense's expert in the computation of damages. The district court entered judgment for the government in the amount of $ 437,862.56, after finding that Haulaway's violations of the Act were willful, because both the general manager and the payroll supervisor knew of the time and a half requirement for overtime. In addition, the court granted the government injunctive relief to ensure future compliance with the record keeping requirements.

Haulaway filed a timely appeal and alleges that the three week continuance was insufficient to permit it to prepare a defense against the government's expert witness who had been called after the trial commenced and that the district court should have granted a new trial. In addi-

tion, Haulaway contends that the district court improperly applied a three year statute of limitation due to its finding of willfulness, when the two year limitation period was applicable.

II.

We review the district court's denial of a new trial for an abuse of discretion, unless the district court's denial is based on an interpretation of law over which our review is plenary. Honeywell v. American Standards Testing Bureau, 851 F.2d 652, 655 (3d Cir. 1988). Similarly, the district court's decision to admit evidence is reviewed for an abuse of discretion. Id. at 657. In general, the conduct of the trial is left to the broad discretion of the trial judge and we will not substitute our judgment for that of the district court unless there has been an abuse of discretion. Stich v. United States, 730 F.2d 115, 117 (3d Cir. 1984). "This general rule is particularly applicable to the matter of the admission or exclusion of expert evidence." Id.

Haulaway argues that the district court failed to mitigate its admitted error by not ordering a new trial after it had required the government to produce its expert witness three days into the trial. We disagree. Although the district court expressed concern that it had made a mistake by not requiring a more detailed explanation within the pretrial order of the government's offer of proof, to say that the court was unable to mitigate the mistake by any manner other than a new trial is a meritless argument. Foremost, we are not reviewing the record of a jury trial, but rather, the record of a bench trial before an experienced jurist. The district court had knowledge of the case, having supervised it since its inception. Moreover, the district court granted Haulaway a three week continuance to prepare a defense to the expert's report and would have granted additional time if Haulaway had so requested. Since Haulaway was aware that the expert might be called as a witness based on the list of witnesses in the pretrial order, Haulaway cannot claim to be surprised that the court required his testimony. We conclude that the three week continuance to prepare a defense was adequate in these circumstances.

Haulaway's next contention is that the district court erred by determining that the employees did not

take breaks during the work day. Haulaway points to testimony by several employees that they stopped at fast food restaurants or the general store for lunch. This "catch as catch" can policy would result in some individuals taking lunch breaks while others, possibly in a desire to finish early, would work straight through the workday, often eating in the truck. Because the district court did not find a stated policy requiring the employees to take lunch breaks at specific times, the court concluded that the majority of the employees were not receiving noncompensable break periods as defined by law. Consequently, those periods had to be calculated as time worked. "To qualify as a bona fide noncompensable break, the respite must be uninterrupted and at least 30 minutes in duration, and the employee must be completely relieved from duty." Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1115, n.1 (4th Cir. 1985), citing 29 C.F.R. Section 785.19. We hold that the district court's finding was not clearly erroneous.

Haulaway's final point is that the three year statute of limitations was inapplicable since the district court's finding of willfulness was erroneous. In McLaughlin v. Richland Shoe Co., 486 U. S. 128 (1988), the Supreme Court stated that "[t]he standard of willfulness that was adopted in Thurston [Trans World Airlines v. Thurston, 469 U. S. 111 (1985)] - that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by statue - is surely a fair reading of the plain language of the Act." 486 U.S. at 133. Both the general manager and the payroll supervisor were aware that the Act, 29 U.S.C. Section 207 (a) (1), requires employers to compensate employees that work in excess of forty hours a week at a rate one and one-half times the hourly rate. Thus, the employer had knowledge, as required by the McLaughlin standard, and nonetheless failed to pay the overtime premium and, indeed, failed to keep records, a violation of 29 U.S.C. Section 211 (c) in order to mask the violations. Clearly, the record supports the district court's finding of willfulness.

III.

For the above reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

"CAROL LOS MANSMANN"
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5056

ELIZABETH DOLE,
Secretary of Labor,
United States
Department of Labor

Appellee

vs.

HAULAWAY, INC.; JOSEPH SCUGOZA, Individually
Appellants

SUR PETITION FOR REHEARING

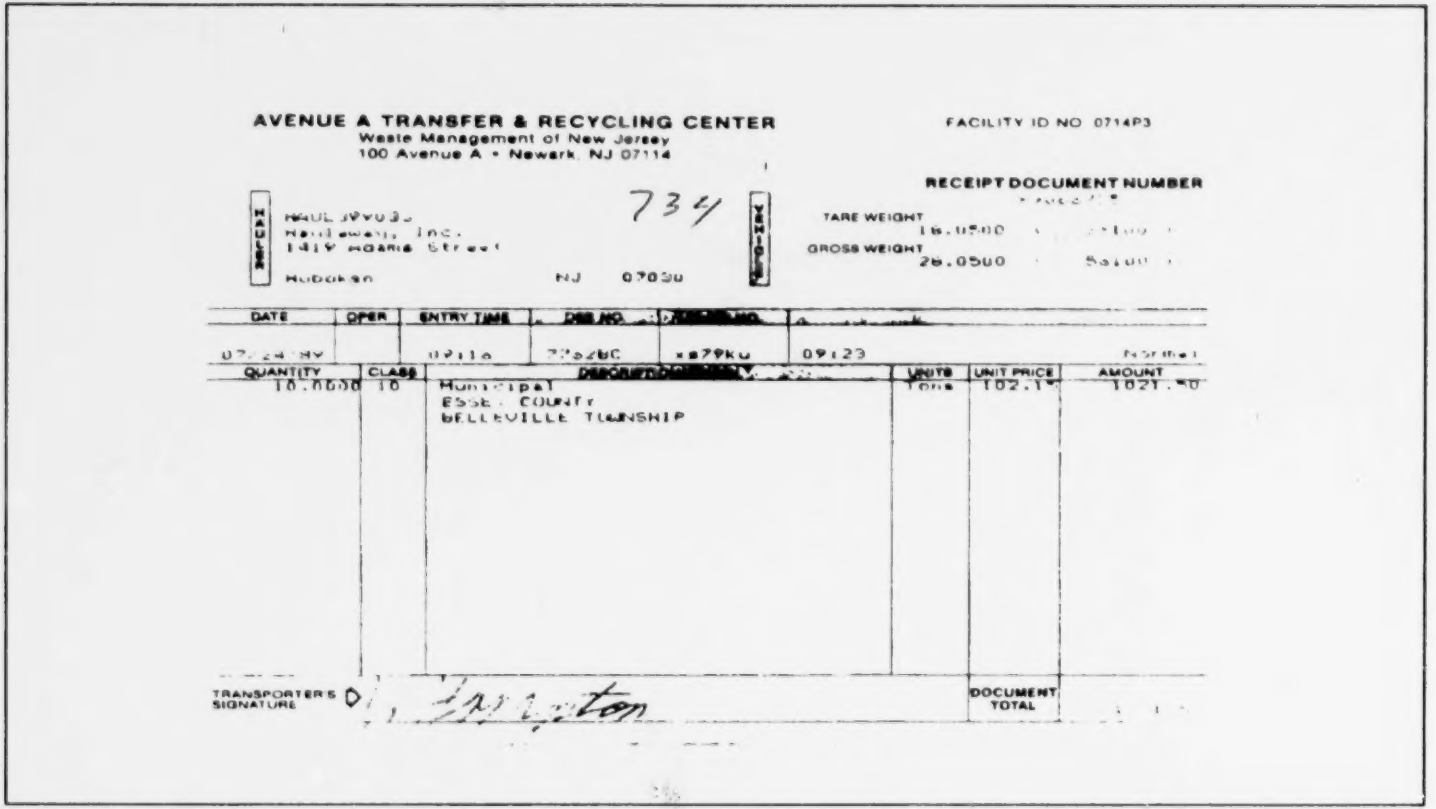
Present: MANSMANN, GREENBERG and SEITZ,
Circuit Judges.

The petition for panel rehearing filed by appellants in the above entitled case having been submitted to the judges who participate in the decison of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT,

"CAROL LOS MANSMANN"
Circuit Judge

OCT 2, 1990



AVENUE A TRANSFER & RECYCLING CENTER
Waste Management of New Jersey
100 Avenue A • Newark, NJ 07114

FACILITY ID NO 0714P3

RECEIPT DOCUMENT NUMBER

734

HAUL
Haulaway, Inc.
1419 Adams Street
Hoboken NJ 07030

TARE WEIGHT 16.0500
GROSS WEIGHT 26.0500

DATE	OPER	ENTRY TIME	[illegible] NO.	[illegible] NO.	[illegible]
07/24/XX		09:16	73562C	x879ku	09:23

QUANTITY	CLASS	DESCRIPTION	UNITS	UNIT PRICE	AMOUNT
10.0000	10	Municipal ESSEX COUNTY BELLEVILLE TOWNSHIP	Tons	102.1*	1021.50

TRANSPORTER'S SIGNATURE [signature]

DOCUMENT TOTAL

DEFENDANT'S EXHIBIT D-37

BERGEN COUNTY
UTILITIES AUTHORITY

RATE CODE	10 COMPACTED 20 UNCOMPACTED
FILL TYPE	
10 BULKY OR HOUSEHOLD WASTE 12 CONSTRUCTION DEBRIS 13 DEMOLITION WASTE 20 VEGETATIVE WASTE	21 INDUSTRIAL AND FOOD PROCESSING WASTE 22 SPECIAL CLASS 'A' 23 MEDICAL AND PHARMACEUTICAL WASTE 24 INFECTIOUS WASTE

HAULAWAY INC.
1419 ADAM ST.
HOBOKEN
NJ
07030

ATTN

SWA7762

PAGE NO 330
DATE 05 01 87
CUSTOMER NO 430

** APRIL **

PAGE 1

TICKET	DATE	TIME	TRUCK TYPE	YARDS	FILL TYPE	PAGE	CHARGES	PAYMENTS
			PRIOR BALANCE (BILLS)					118,551.50
			PRIOR INTEREST					2,173.30
			CASH (PRINCIPAL)					76,232.25
			CASH (INTEREST)					2,173.30
			SUB TOTAL					42,319.25
			INTEREST ON SUB TOTAL					634.78
			PRIOR BALANCE + INTEREST					42,954.03
102019	870401	08 08	ROLL-OFF	25	13	1	167.00	
102137	870401	11 49	COMPACTED	25	10	2	123.75	
102207	870401	14 25	COMPACTED	25	10	2	123.75	
202142	870401	10 27	ROLL-OFF	25	13	1	167.00	
202152	870401	10 57	COMPACTED	31	10	2	153.45	
202190	870401	11 52	ROLL-OFF	25	13	1	167.00	
102228	870402	07 05	COMPACTED	25	10	2	123.75	
102274	870402	08 26	ROLL-OFF	40	13	1	267.20	
102308	870402	09 45	COMPACTED	25	10	2	123.75	
102316	870402	10 02	ROLL-OFF	40	13	1	267.20	
102320	870402	10 06	ROLL-OFF	25	13	1	167.00	
102417	870402	12 15	ROLL-OFF	25	13	1	167.00	
102427	870402	12 29	COMPACTED	31	10	2	153.45	
102483	870402	14 15	COMPACTED	25	10	2	123.75	
202436	870402	11 39	ROLL-OFF	25	13	1	167.00	
202484	870402	13 42	ROLL-OFF	25	13	1	167.00	
102546	870403	08 25	ROLL-OFF	25	13	1	167.00	
102659	870403	12 16	COMPACTED	31	10	2	153.45	

BALANCE DUE

PAYMENT DUE 10 DAYS FROM RECEIPT OF STATEMENT

MAKE CHECKS PAYABLE TO BCUA SOLID WASTE MANAGEMENT
REMIT TO LOCK BOX P O BOX 883 MAYWOOD NJ 07607

BOX 122 FOOT OF MEHRHOF ROAD
LITTLE FERRY NEW JERSEY 07643

ORIGINAL

JOHN J. PRIBISH
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850 U.S. HIGHWAY 1
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ADRIENNE C. ROGOVE
BENJAMIN S. BUCCA, JR.
DALE W. BAKER*

*MEMBERS OF NJ & PA BARS

FILE NO.

August 8, 1989

Dickinson R. Debevoise, U.S.D.J.
U.S. Courthouse & Post Office Bldg.
Newark, NJ 07102

FEDERAL EXPRESS

RE: U.S. Dept. of Labor v. Haulaway, et als.
Civil Action No. 87-2938

Dear Judge Debevoise:

Since the break of the trial in the above referenced matter, Adrienne C. Rogove, several of the employees of Haulaway, our expert, Steve Schneider, and two other individuals, plus a potential second expert have been working diligently collecting and sorting what has turned out to be a voluminous amount of material -- both in terms of physical documents and public records from the various municipalities.

As a consequence of the above, I realized that it would be almost impossible for us to have completed the supplemental expert's report that we had indicated we would have completed to the court and counsel on Monday, August 7, 1989.

Accordingly, I telephoned Jon Kay on Friday, August 4, 1989 and discussed the above with him. At the same time, I asked Mr. Kay to consent to an application that I

would be making to your Honor for a continuance of the trial. Mr. Kay advised that while he was sympathetic, he could not consent to the application.

In view of the above, I would respectfully request that the court adjourn this matter at least until August 21, 1989 or at a date and time to be fixed for September 1989. The reasons for this application are as follows:

1. The amount of material that has been discovered from the public agencies has been extremely voluminous -- in some instances, municipalities recorded the time of the complaints, but also kept a list of the trucks who went to the landfill, togetner with the date and time of the arrival at the said landfill/transfer station.

2. Certain of the public employees in the various municipalities have very distinct recollections of how, when, where and why the solid waste collections were made.

3. The landfills, although extremely cooperative, are unwilling to release the information until they have been provided with a subpoena and until we pay them in advance for the time thy will spend in getting out the information we request -- in this regard, the landfills have been contacted, subpoenas have been procured and checks have been cut for the money requests.

In addition to the above, we have also engaged in discussion with a potential second expert witness who is nationally known to provide us with an opinion based upon statistical data in terms of a time and motion study.

Obviously, the intention on the part of Haulaway is to provide the court, as well as the government, with a totally reconstructed employment record for all of the employees, which is based upon competent and statistical evidence. As I indicated in my conversation with Mr. Kay, it is only by submitted this kind of report can one reach a decision

that would be fair and equitable not only to the employees, but also to Haulaway.

In view of the above, I would respectfully request that the court grant this request for a continuance of the trial as indicated above.

Respectfully submitted,

"JOHN J. PRIBISH"
JOHN J. PRIBISH

JJP:hjk
cc Jonathan Kay, Esq.
Thomas Meisner, Clerk

Supreme Court, U.S.
FILED
MAR 6 1991
OFFICE OF THE CLERK

No. 90-1063

In the Supreme Court of the United States

OCTOBER TERM, 1990

HAULAWAY INCORPORATED, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court abused its discretion by not granting a mid-trial continuance of more than 24 days and by denying a motion for a new trial.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. PA40-PA45) is unreported. The opinion of the district court (Pet. App. PA4-PA38) is reported at 723 F. Supp. 274. The order of the district court denying petitioners' motion for a new trial (Pet. App. PA39) is unreported. The final judgment of the district court (Pet. App. PA1-PA3) is unreported.

JURISDICTION

The decision of the court of appeals was entered on August 22, 1990, and the petition for panel rehearing was denied on October 2, 1990 (Pet. App. PA46). The petition for a writ of certiorari was

filed on January 2, 1991 (the Wednesday following two holidays). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Haulaway Incorporated and Joseph Scugoza, its sole owner and president, are in the trash removal business. Pet. App. PA6. During the periods relevant to this case, Haulaway serviced four residential communities and four commercial routes in New Jersey. Its drivers worked a variable work week, depending on the route, day of week, and other factors and conditions. *Id.* at PA7-PA9, PA41. Petitioners did not keep records of actual hours worked, but kept track only of days worked and the weekly pay for each employee. The general practice was to pay each driver for a six-day, 48-hour week—regardless of how many more hours the employee had worked—with eight of those hours paid at double rate. *Id.* at PA12.

2. In July 1987, the Secretary of Labor filed suit against petitioners, alleging willful violations of the overtime and record keeping requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C. 207, 211(c). Pet. App. PA6, PA41. At the ensuing bench trial, the Secretary presented the testimony of a number of employees concerning the hours worked by them and their fellow employees, from which the amount of unpaid compensation could be calculated. *Id.* at PA7. Under the terms of the pretrial order, the Secretary next was to present testimony from the investigating compliance officer on "application of the statutory formula for overtime compensation and the method for calculating of overtime due, depending on the court's finding of hours worked," and to "submit [a post-

trial] exhibit listing the amount due each employee for incorporation into the Final Judgment." *Ibid.*; see also *id.* at PA9, PA42.

On the third day of trial, however, the court concluded that this approach was unsatisfactory, because it imposed on the court the task of deducing from the record the actual hours worked for each employee and did not require the Secretary to provide, until after the trial, a bottom-line figure on the unpaid overtime compensation that was owed. Accordingly, the court directed the Secretary to provide expert testimony on "the bottom line and the reasons for the bottom line and a schedule to back it up," and adjourned the trial for six days to permit the Secretary to develop the necessary data. Pet. App. PA10; see *id.* at PA9, PA42. After the six-day break, the compliance officer expanded his expected testimony on methodology, supported by illustrative examples, to include an unpaid overtime figure for each employee and a total figure (as later corrected) of $583,818.75. *Id.* at PA10-PA11. Among other things, the testimony demonstrated that, with regard to non-testifying employees, the typical six-day work week required 66 ¼ hours on average before 1987, a time period in which each driver's duty included washing the truck at the end of the day, and 60 hours after 1987, when that duty ceased. *Id.* at PA14-PA15, PA33; 723 F. Supp. at 280.[1]

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[1] The Petition Appendix contains an incorrect reproduction of the district court's opinion on this point. The last sentence in the second full paragraph of Pet. App. PA14 should read: "Using this approach Martoccia arrived at an average of 66 1/4 hours per week *for the period prior to 1987 and an average of 60 hours per week* for the period after January 1987." 723 F. Supp. at 280 (italicized language omitted from Petition Appendix).

To give petitioners the opportunity to prepare adequate cross-examination of this expanded testimony and to complete their alternative computations, the court continued the trial for three-and-one-half weeks, "when, presumably [petitioners] would be ready." Pet. App. PA15; see also *id.* at PA42, PA50. Upon the trial's resumption, petitioners cross-examined the compliance officer and presented an expert witness, who testified, based on a study of the routes and landfill/transfer station records, that the total unpaid overtime compensation was $200,875. *Id.* at PA17-PA18.[2] Later, petitioners submitted a post-trial brief that introduced new material purporting to discredit their own expert's estimate and to show total unpaid overtime compensation of $47,736, but also acknowledging a "worst-case scenario" of $233,731.79. *Id.* at PA19. The court rejected petitioners' post-trial attempt "to alter the evidence submitted by them and received at trial." *Id.* at PA20.

With regard to the overtime compensation calculations, the court found that "[b]oth the government's and [petitioners'] methods of computing overtime hours are imperfect devices necessitated by [petitioners'] inexcusable failure to keep adequate records." Pet. App. PA21. In particular, the court determined petitioners' approach to be "fatally flawed" for ten separate reasons. *Ibid.* For instance, petitioners' calculation took no account of the considerable time spent washing trucks before 1987 or waiting at the transfer stations and landfills after weigh-

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[2] Because petitioners failed to give the Secretary two weeks advance notice of their expert's conclusions, as the court had required, the Secretary was permitted to provide a post-trial affidavit criticizing this evidence. Pet. App. PA16, PA19-PA20.

ing in; it used an erroneous starting time for many routes; and, in many instances, it inflated the number of work shifts by counting a same-day return trip to a dump site as a separate shift, thus understating the amount of overtime. *Id.* at PA21-PA22. In contrast, the court found that the Secretary's approach was "basically sound." *Id.* at PA23. Nevertheless, it concluded that the Secretary's estimate was "[u]pwardly skew[ed]" by "exaggerations" in some of the workers' testimony of actual hours worked and by the the fact that petitioners were in substantial compliance with the overtime requirements toward the end of the relevant time period. *Id.* at PA24.[3] To compensate, the court discounted the Secretary's figure by 25%, reducing the amount of unpaid overtime to $437,862.56, and deemed the petitioners to have complied with all overtime requirements from April 1, 1989, onward. *Id.* at PA25.[4]

On the basis of its findings, the district court concluded that petitioners violated the Section 7 overtime requirements of the FLSA, and that they were

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[3] The court rejected petitioners' criticism that the Secretary's methodology failed to account for the employees' asserted taking of noncompensable breaks or performing of personal tasks during work time. Pet. App. PA23; see also 723 F. Supp. at 285 (petitioners' reproduction of the court's opinion is missing several key words at this point). The court found instead that any breaks taken were sufficiently brief and haphazard to be compensable (see 29 C.F.R. 785.19), and that any performance of personal tasks was sufficiently infrequent as not to affect the overall calculations. Pet. App. PA23-PA24; see also *id.* at PA43-PA44.

[4] For the latter period, the court held that any employee could bring a separate new action asserting a failure to pay overtime after April 1, 1989. Pet. App. PA25.

"in flagrant violation" of the Section 11 record keeping requirements. Pet. App. PA26-PA27. Applying *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), it held the violations to be "willful," thus invoking the three-year statute of limitations under Section 6(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 255(a). Pet. App. PA27. Moreover, petitioners' lack of good faith or reasonable grounds, including their "evasive, dilatory and obstructive conduct after [the Secretary] commenced [her] investigation," prompted the court to award liquidated damages "in an amount equivalent to the unpaid overtime compensation found due," in accordance with Section 16(c) of the FLSA, 29 U.S.C. 216(c). Pet. App. PA28. Finally, the court granted the Secretary's request for a prospective injunction "to ensure future compliance with both record keeping and overtime payment provisions of the Act." *Id.* at PA30; see also *id.* at PA1-PA3.

The court denied petitioners' motion for a new trial. Pet. App. PA39.

3. The court of appeals affirmed. Petitioners maintained that the continuance had been insufficient to permit them to prepare a defense against the government's expert witness, and that a new trial should have been ordered. The court of appeals rejected this argument. It emphasized the "broad discretion of the trial judge" in managing a trial (Pet. App. PA43), and held that the trial court had not abused its discretion "[b]ecause the district court gave [petitioners] a three-week continuance, during which time [they] could prepare for cross-examination of the expert witness" and because "the government had listed the witness in its pretrial report as a possible

witness, thereby putting petitioners on notice." *Id.* at PA41.[5]

ARGUMENT

Petitioners maintain that the district court abused its discretion in not granting a continuance of more than 24 days and in denying petitioners' motion for a new trial, and that the court of appeals erroneously rejected their claim. Petitioners' challenge to the district court's exercise of discretion is fact-bound and meritless, and does not warrant review.

The district court suspended the trial twice, once for six days as a result of its mid-trial order that the Secretary include expert testimony on the total amount of unpaid overtime compensation, and once for 24 days to permit petitioners "a reasonable opportunity to meet the government's evidence and to present their own." Pet. App. PA10. Contrary to petitioners' assertion (Pet. 6), the initial order directing the Secretary to present testimony on the total amount due did not "radically alter[] the case." And the ensuing testimony presented by the Secretary did not necessitate more than a 24-day continuance for petitioners to prepare a response.

As an initial matter, the pretrial order unmistakably stated that the Secretary's compliance officer was scheduled to testify not only about "his investigation activities on this case," but about "sample computations explaining the method by which overtime compensation found due may be calculated for all affected employees." Pet. 25. As a result of the

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[5] In addition, the court of appeals also rejected petitioners' contentions that the district court's determination regarding employee breaks was clearly erroneous, and that the record did not support a finding of willfulness. Pet. App. PA43-PA44.

court's order, the compliance officer simply extended his presentation of "sample computations" to include the calculations for all affected employees that were derived from application of the described methodology to the record evidence on hours worked by the individual employees. The court of appeals was thus correct in its observation that "[s]ince [petitioners were] aware that the expert might be called as a witness based on the list of witnesses in the pretrial order, [petitioners] cannot claim to be surprised that the court required his testimony." Pet. App. PA43.

Moreover, with regard to petitioners' claim that they were surprised by the scope of the compliance officer's testimony, the 24-day continuance to prepare cross-examination—four times the amount of time the Secretary was given to prepare the expanded testimony directed by the court—was fully sufficient to negate any potential prejudice. By their own account, petitioners initially told the court that two weeks would suffice. Pet. 10. On August 8, 1989, they asked the court "to adjourn this matter at least until August 21, 1989 or at a date and time to be fixed for September 1989." Pet. App. PA50.[6] The trial resumed on August 21, as requested, at which time petitioners cross-examined the compliance officer and proceeded with their own expert, who presented alternative computations on the amount of unpaid overtime. *Id.* at PA15, PA17.[7]

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[6] The compliance officer had testified on July 26, and since July 27, the trial had been suspended to allow petitioners preparation time. See Pet. 2; Pet. App. PA6.

[7] In view of these facts, it does not appear that the court of appeals was incorrect in observing that petitioners made no request for additional time. (See Pet. 15, 21-22.) In any event, in view of the ample time afforded, the question whether more time was sought is not a significant one.

Indeed, from all appearances, petitioners' efforts during the 24-day recess were expended on gathering evidence to support their own alternative computations. Pet. App. PA15-PA17; see also Pet. 13. Moreover, the need for such evidence, in order to reconstruct employment histories in the absence of proper records, did not originate with the court's order that the Secretary present a bottom-line figure on total unpaid overtime, or with the compliance officer's testimony in response to that order. Rather, petitioners' need for such evidence was apparent from the outset if petitioners were to defend against the allegations of overtime violations, and was a direct consequence of petitioners' "inexcusable failure to keep adequate records." Pet. App. PA21. See also *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946) (absent proper records, the burden is on the employer "to come forward with evidence of the precise amount of work performed" or with evidence to rebut the employee's evidence of the amount of uncompensated work).

Finally, petitioners' claim of prejudice is untenable. When the trial resumed, petitioners simply complained about "the enormity of the task that [they] had undertaken," indicated that they had hoped, in addition to the considerable information they were able to adduce, to present a bar graph "show[ing] the percentage of days in which there was overtime and the percentage of days in which there were days worked less than eight hours," and expressed uncertainty as to whether they would actually use the graph if completed. See Pet. 10, 13. The district court's failure to grant a continuance of more than 24 days—and its denial of the new trial motion—was entirely appropriate, and was well

within the district court's broad discretion on such matters. See Pet. App. PA43.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

NATHANIEL I. SPILLER
Senior Appellate Attorney
Department of Labor

MARCH 1991

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[8] Petitioners' suggestion that the district court further abused its discretion in an unrelated evidentiary ruling denying petitioners' request to present a second expert witness (Pet. 14-15) is similarly meritless and unworthy of review. Petitioners presented extensive expert testimony (Pet. App. PA17-PA18), and the decision regarding additional testimony was a proper exercise of judicial discretion. See, *e.g.*, *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962) (lower court's decision to exclude or admit expert evidence will be sustained unless manifestly erroneous); *Hopkins* v. *Britton*, 742 F.2d 1308, 1311 (11th Cir. 1984) (court has discretion to reject cumulative testimony).

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